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In The

Supreme Court of the United States

NEBRASKA TELECOMMUNICATIONS ASSOCIATION AND NEBRASKA CABLE COMMUNICATIONS ASSOCIATION,

Petitioners,

vs.

CITY OF LINCOLN, NEBRASKA, d/b/a LINCOLN ELECTRIC SYSTEM,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

HARDING, SHULTZ & DOWNS and
JACK L. SHULTZ
Counsel of Record
GREGORY D. BARTON
800 Lincoln Square
121 S. 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 434-3000
Attorneys for Petitioners Nebraska Telecommunications Association and Nebraska Cable Communications Association

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QUESTION PRESENTED

In enacting 47 U.S.C. § 253(a), which precludes state or local laws that prohibit or have the effect of prohibiting the ability of "any entity" to provide interstate or intrastate telecommunications service, did Congress make it unmistakably clear in the language of the statute that Congress intended to pre-empt the historic powers of the States to regulate their own political subdivisions?

PARTIES TO THE PROCEEDING

Petitioners are the Nebraska Telecommunications Association (the "NTA") which intervened and the Nebraska Cable Communications Association ("NCCA") which protested in the Nebraska Public Service Commission, to oppose the application of the City of Lincoln, Nebraska, d/b/a Lincoln Electric System ("LES"), for authority to provide intrastate for-hire contract carrier telecommunications services. The Nebraska Public Service Commission was the Appellee below. The NTA was the lead Appellee/Intervenor in the Nebraska Supreme Court. The Appellant below was LES, which is the Respondent herein.

The NTA is a non-profit corporation organized under the laws of the State of Nebraska, with offices located at 801 Lincoln Square, 121 South 13th Street, Lincoln, Nebraska 68508. The NTA does not have a parent company or any affiliate companies. There is no public corporation which owns 10% or more of the NTA's stock.

The NCCA is a non-profit corporation organized under the laws of the State of Nebraska, with offices located at 635 So. 14th Street, Suite 315, Lincoln, Nebraska 68508. The NCCA does not have a parent company or affiliate companies. There is no public corporation which owns 10% or more of the NCCA's stock.

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The opinion of the Nebraska Supreme Court (Appendix ("App.") at pp. 1 through 24), filed January 10, 2003, is reported as *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003). The Nebraska Supreme Court's Order denying the NTA's Motion for Rehearing, entered on February 12, 2003, appears in the Appendix at page 57. The Nebraska Public Service Commission's unreported Order, entered on January 9, 2001, which granted the NTA's Motion for Declaratory Ruling and dismissed LES's Application for a permit to provide telecommunications services as a contract carrier, appears in the Appendix at pages 25 through 51.

JURISDICTION

The judgment of the Nebraska Supreme Court was entered on January 10, 2003. (App. 1; 265 Neb. at 70, 655 N.W.2d at 363.) The NTA's Motion for Rehearing was denied by the Nebraska Supreme Court on February 12, 2003. (App. 57.) The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. VI, cl. 2:

> This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in

> every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

47 U.S.C. § 253(a):

> (a) In General – No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

NEB. REV. STAT. § 86-128(1)(b) (Cum. Supp. 2002) (App. 58):

> The commission may only issue a certificate of public convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier after due notice and hearing pursuant to commission rules and regulations. The commission shall not issue a certificate or a permit to an agency or political subdivision of the state.

NEB. REV. STAT. § 86-575(2) (Cum. Supp. 2002) (App. 58):

> No agency or political subdivision of the state shall provide telecommunications services for a fee, except as authorized in sections 79-1319, 81-1120.01 to 81-1120.28, 85-401 to 85-418, and 85-1501 to 85-1542, or be issued a certificate of public convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier. Any agency or political subdivision which sells or leases its

dark fiber pursuant to sections 86-574 to 86-578 shall not be deemed to be providing telecommunications services for a fee.[1]

STATEMENT OF THE CASE

This case involves the important federal question of whether Congress has acted to deprive the States of the ability to control their own political subdivisions in matters pertaining to the provision of telecommunications services. This is an important question of national impact which has not been, but should be, settled by this Court.

On October 4, 2000, LES, a political subdivision of the State of Nebraska, filed an Application seeking authority from the Nebraska Public Service Commission to provide non-switched digital transmission services in and around Lincoln, Nebraska, as a contract carrier of telecommunications services. (App. 27.) In its Application, LES asserted, among other things, that the Charter of the City of Lincoln authorized LES to provide for-hire telecommunications services. (App. 28.)

On November 3, 2000, the NTA formally intervened and the NCCA filed a formal protest, in the Nebraska Public Service Commission, to oppose the LES Application. (App. 144-154.) A majority of the NTA's members hold certificates of public convenience and necessity as

[1] All Nebraska state statutory sections referenced in NEB. REV. STAT. § 86-575(2) (Cum. Supp. 2002) are set forth verbatim in the Appendix at pages 58 through 137.

telephone common carriers providing intrastate telecommunications service, including local exchange service and non-switched digital transmission services, at various locations throughout the State of Nebraska. (App. 144.) The NCCA has general power to promote and advance the operation and development of cable communications in Nebraska, and to provide information to political subdivisions and the general public related to the operation and development of cable communications in Nebraska, on behalf of the NCCA's membership. (App. 148-149.)[2]

On November 9, 2000, the NTA filed a Motion for Declaratory Ruling in the Nebraska Public Service Commission. The NTA asked the Commission to declare as a matter of law that LES was not authorized to offer for-hire telecommunications services or to hold a contract carrier permit to perform such services, because LES lacked the required legal authority. (App. 155-156.) The Commission entered its Order Re: Declaratory Ruling on January 9, 2001. In granting the NTA's Motion for Declaratory Ruling and dismissing LES's Application for a permit to provide telecommunications services as a contract carrier, the Commission specifically determined that: (1) "there is no statute, charter provision or ordinance which either expressly or implicitly grants to LES the power to engage in the for-hire contract carrier telecommunications business"; and (2) "Lincoln's home rule charter grants only

[2] In addition to the NTA and the NCCA, a number of other interested parties either intervened or protested the LES application in the Nebraska Public Service Commission, and were identified as parties to the proceedings below. (App. 25-26.) These were nominal parties below, who have no interest in the outcome of this Petition, and all such parties have been identified in Petitioners' notice filed and served pursuant to Rule 12.6.

strictly municipal powers which are strictly construed, and the fact that the provision of telecommunications services for-hire in Nebraska is a subject that pertains to state affairs, as distinguished from strictly municipal affairs, means that the provisions of Lincoln's charter must yield to the general laws of the state – general laws which clearly do not grant LES the power to engage in the for-hire contract carrier telecommunications business." (App. 45) (emphasis in original).

LES then filed a motion for rehearing in the Commission. By Order of February 21, 2001, the Commission overruled LES's Motion for Rehearing. (App. 52-55.) The Commission adhered to its original determination that LES, as a political subdivision, did not have the legal authority to provide for-hire contract carrier telecommunications services. (App. 53.)

After the Commission entered its final order on February 21, 2001, LES timely appealed to the Nebraska Court of Appeals. The Nebraska Supreme Court then removed the case to its docket, in the exercise of its inherent authority to regulate the dockets of the Nebraska appellate courts.

While LES's appeal was pending in the Nebraska Supreme Court, on May 21, 2001, the Nebraska Legislature passed LB 827. LB 827, 97th Leg., 1st Sess., 2001 Neb. Laws, NEB. LEG. J., pp. 2194-2195 (May 21, 2001). On May 25, 2001, Nebraska's Governor signed LB 827. NEB. LEG. J., p. 2269 (May 29, 2001). The Ninety-Seventh Nebraska Legislature adjourned on May 31, 2001, making LB 827 automatically effective on September 1, 2001, *see*, NEB. CONST. art. III, § 27 ("[n]o act shall take effect until three calendar months after the adjournment of the

session at which it was passed . . . "), long before a final decision on the LES appeal could be entered by the Nebraska Supreme Court.

Because the terms of Sections 2 and 19 of LB 827, *codified at* NEB. REV. STAT. §§ 86-128(1)(b) and 86-575(2) (App. 58), expressly preclude political subdivisions, like LES, from holding a permit as a contract carrier of intrastate telecommunications services, the NTA filed a Motion for Summary Dismissal in the Nebraska Supreme Court, on August 31, 2001. (App. 140-142.) The NTA contended that the appeal was jurisdictionally defective because the issues raised by LES in the Nebraska Supreme Court had been rendered moot by the enactment of LB 827. (*Id.*)

On September 6, 2001, LES filed in the Nebraska Supreme Court a Notice of Constitutional Question. (App. 143.) In this Notice, LES asserted that "Section 2 of LB 827 as passed by the First Session of the Ninety-Seventh Legislature of Nebraska . . . is unconstitutional under the Supremacy Clause of the United States Constitution." (*Id.*) LES also opposed the NTA's Motion for Summary Dismissal on the asserted grounds that Sections 2 and 19 of LB 827 were preempted by § 253(a) of the federal Telecommunications Act of 1996. (App. 158.)

On September 19, 2001, the Nebraska Supreme Court entered an Order, in which the Court denied, without comment, the NTA's Motion for Summary Dismissal. (App. 56.) Thereafter, following oral argument on May 30, 2002, the Nebraska Supreme Court entered its decision on January 10, 2003. (App. 1.) The Nebraska Supreme Court first addressed, necessarily, the threshold federal preemption issue, recognizing that NEB. REV. STAT. §§ 86-128(1)(b) and 86-575(2) "enacted after the Commission's order at

issue in this case would clearly prohibit the city of Lincoln and LES from seeking authority as a telecommunications contract carrier," unless "these statutory provisions are preempted by federal law." (App. 6; 265 Neb. at 75, 655 N.W.2d at 368-369.)

In reaching the federal preemption holding in this case, the Nebraska Supreme Court recognized that there is a significant split of authority regarding the scope of federal preemption under 47 U.S.C. § 253(a). (App. 8-12; 265 Neb. at 75-77, 655 N.W.2d at 369-370.) The Court held that NEB. REV. STAT. § 86-128(1)(b) and § 86-575(2) are preempted by federal law, 47 U.S.C. § 253(a). The Nebraska Supreme Court chose to follow *City of Bristol, VA v. Earley*, 145 F. Supp.2d 741 (W.D. Va. 2001) (state statute which prohibited local governmental entities from offering telecommunications services was preempted by § 253(a)), *vacated*, No. 01-1741 slip op. (4th Cir. May 1, 2002), and *Missouri Municipal League v. FCC*, 299 F.3d 949 (8th Cir. 2002) (holding that state statute which prevented municipalities and municipally-owned utilities from providing telecommunications services was preempted by § 253(a)). (App. 12; 265 Neb. at 77, 655 N.W.2d at 370.) In so holding, the Nebraska Supreme Court rejected the decisions of the United States Court of Appeals for the District of Columbia Circuit, the Federal Communications Commission and the Iowa Supreme Court. *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) (explaining that provisions of § 253(a) do not preempt state statutes which regulate or prohibit a state political subdivision's entry into the telecommunications field); *In re: Public Util. Comm'n of Texas*, 13 FCC Rcd. 3460 (1997) (same effect); and *Iowa Tel. Ass'n v. City of Hawarden*, 589 N.W.2d 245 (Iowa 1999) (determining that provisions of § 253(a) did

not prevent the State of Iowa from regulating the provision of telecommunications services by the state political subdivisions). (App. 12; 265 Neb. at 77, 655 N.W.2d at 370.)[3]

The NTA and NCCA have timely filed this Petition for Writ of Certiorari. The NTA and NCCA ask this Court to reverse the Nebraska Supreme Court's decision to strike down NEB. REV. STAT. §§ 86-128(1)(b) and 86-575(2) because that decision has deprived the State of its ability to regulate its political subdivisions, thereby significantly altering the State of Nebraska's governmental structure. The decision has paved the way for unfair competition by tax exempt political subdivisions, contrary to Nebraska statutes and the purposes of the Telecommunications Act of 1996.

[3] Once the federal preemption hurdle was cleared, the Nebraska Supreme Court also held the Nebraska Public Service Commission erred in "finding that the city of Lincoln lacked the legal authority to provide for-hire telecommunications services" but, "because LES has not been authorized by ordinance to seek regulatory authority to provide such services, the Commission properly denied its application." (App. 24; 265 Neb. at 82, 655 N.W.2d at 373.)

ARGUMENT

1. AN IMPORTANT FEDERAL QUESTION EXISTS, UNRESOLVED BY THIS COURT, AS TO WHETHER § 253(a) OF THE TELECOMMUNICATIONS ACT OF 1996 PREEMPTS STATE STATUTES WHICH PROHIBIT POLITICAL SUBDIVISIONS FROM PROVIDING PRIVATE, FOR-HIRE TELECOMMUNICATIONS SERVICES.

During the 2001 Nebraska legislative session, LB 827 was enacted into law, under which the Nebraska Legislature determined as a matter of statewide public policy that: (A) "No . . . political subdivision of the state shall . . . be issued a . . . permit as a telecommunications contract carrier" by the Nebraska Public Service Commission (App. 58; NEB. REV. STAT. § 86-575(2) (Cum. Supp. 2002)); and (B) "The commission shall not issue a . . . permit as a telecommunications contract carrier to a[ ] . . . political subdivision of the state." (App. 58; NEB. REV. STAT. § 86-128(1)(b) (Cum. Supp. 2002).)

The federal statute which gave rise to the preemption issue in this case is 47 U.S.C. § 253(a). Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added). The Nebraska Supreme Court determined that it had to address the federal preemption issue first because these "Nebraska statutory provisions enacted after the Commission's order at issue in this case would clearly prohibit the city of Lincoln and LES from seeking authority as a telecommunications contract carrier," unless these state statutes were preempted by federal law. (App. 6; 265 Neb. at 75,

655 N.W.2d at 368-369.) The Court recognized that the federal preemption issue had become the key threshold issue in the appeal, stating that "[u]nless LES is correct in its assertion that these [state] statutory provisions are preempted by federal law, the single issue presented in this appeal" of whether LES lacked the legal authority to operate as a for-hire telecommunications carrier "would be moot." (*Id.*)

While recognizing there was a significant split of legal authority, the Nebraska Supreme Court held that 47 U.S.C. § 253(a) preempted NEB. REV. STAT. § 86-128(1)(b) (Cum. Supp. 2002) and NEB. REV. STAT. § 86-575(2). (App. 8-12; 265 Neb. at 76-80, 655 N.W.2d at 368-370). The Nebraska Supreme Court relied on the decisions in *City of Bristol, VA v. Earley*, 145 F. Supp.2d 741 (W.D. Va. 2001) (state statute which prohibited local governmental entities from offering telecommunications services was preempted by § 253(a)), *vacated* No. 01-1741 slip op. (4th Cir. May 1, 2002), and *Missouri Municipal League v. FCC*, 299 F.3d 949 (8th Cir. 2002) (Missouri statute which prevented municipalities and municipally-owned utilities from providing telecommunications services was preempted by § 253(a)). The Nebraska Supreme Court reasoned that Congress' use of the term "any entity" in § 253(a) was "indicative of an expansive statutory scope which includes a governmental entity, such as a municipally owned utility, seeking to provide telecommunications services," such that the absolute prohibitions of § 86-128(1)(b) and § 86-575(2) "are preempted by federal law and are unconstitutional." (App. 12; 265 Neb. at 79-80, 655 N.W.2d at 369-372.) *Contra, City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) (provisions of § 253(a) do not preempt state statutes which regulate or prohibit a state political subdivision's entry

into the telecommunications field); *Iowa Tel. Ass'n v. City of Hawarden*, 589 N.W.2d 245 (Iowa S. Ct. 1999) (agreeing with the D.C. Circuit's "interpretation of § 253(a) and hold[ing] that this statute does not prevent the State of Iowa from prohibiting the offering of local telephone service by its political subdivisions"); and *In re: Public Util. Comm'n of Texas*, 13 FCC Rcd. 3460 (1997) (rejecting the city of Abilene's federal preemption arguments because cities are not entities separate and distinct from the state for the purpose of § 253 preemption and a finding of preemption would inject the FCC into the relationship between states and their political subdivisions in a way not intended by Congress).

The Nebraska Supreme Court's federal preemption holding in this case has stood the State's hierarchy on its head. Unless the decision below is reversed, the City of Lincoln, d/b/a LES, a subordinate political subdivision of the State of Nebraska, will be able to provide for-hire telecommunications services, directly contrary to the Nebraska Legislature's pronouncement.

The national significance of the federal preemption issue in this case is clearly shown by this Court's longstanding recognition that "[p]olitical subdivisions of States – counties, cities or whatever – *never were and never have been* considered as sovereign entities" because local governmental units within a State had long been treated as "*mere 'convenient agencies' for exercising State powers.*" *Sailors v. Board of Educ.*, 387 U.S. 105, 107-108 (1967) (emphasis added). *See also United States v. Railroad Company*, 84 U.S. (17 Wall.) 322, 328-329 (1872) (States have "exclusive and unrestrained control" over their political subdivisions and the "absolute" right to control their creations); and *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71

(1978) (States have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them"). Indeed, the creation and regulation of political subdivisions is "central to state self-government." *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 443 (2002) (recognizing that the "principle is well-settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion" and "[w]hether and how to use that discretion is *a question central to state self-government*") (emphasis added).

The conflicts which have developed between the Nebraska and Iowa Supreme Courts, and between the District of Columbia and Eighth Circuits, concerning the scope of federal preemption under § 253(a), have created an untenable circumstance, under which LES is free to engage in a private telecommunications enterprise contrary to the will of the Nebraska Legislature. Conversely, municipally-owned utilities located a mere seventy miles to the east, across the Missouri River in the State of Iowa, are bound by the Iowa Legislature's determination to prohibit the offering of local telephone service by Iowa political subdivisions.

The need to resolve this conflict is graphically demonstrated by the result reached by the Nebraska Supreme Court in this case. The Court's federal preemption holding has deprived the State of Nebraska of its unfettered discretion to regulate one of its own political subdivisions, LES, with respect to municipal entry into a telecommunications private enterprise. This infringement upon the State's "absolute discretion" clearly raises a substantial

"question central to state self-government." *City of Columbus*, 536 U.S. at 443. Accordingly, the Nebraska Supreme Court's § 253(a) preemption holding should be vacated because it leads to an untenable result which Congress could not have intended – the use of two cryptic words to "interfer[e] with the relationship between a State and its political subdivisions [which] strikes near the heart of State sovereignty." *City of Abilene*, 164 F.3d at 50-51.

The national importance of the issue of the scope of federal preemption under § 253(a) of the Telecommunications Act is further exemplified by the fact that the Federal Communications Commission, the State of Missouri and Southwestern Bell Telephone, L.P., formerly known as Southwestern Bell Telephone Company, have each filed a Petition for Writ of Certiorari, seeking review of the decision of the United States Court of Appeals for the Eighth Circuit in *Missouri Municipal League v. FCC*, 299 F.3d 949 (8th Cir. 2002), which are currently pending in this Court at Case No. 02-1386, Case No. 02-1238 and Case No. 02-1405, respectively. Thus, certiorari should be granted in this case to resolve the conflicts between the Nebraska and Iowa Supreme Courts, and between the District of Columbia and Eighth Circuits, concerning whether Congress, by using the phrase "any entity" in 47 U.S.C. § 253(a), intended "to alter the 'usual balance between the States and the Federal Government.'" *See Gregory v. Ashcroft*, 501 U.S. 452, 461-462 (1991) quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

2. UNDER THIS COURT'S "PLAIN STATEMENT" RULE OF STATUTORY CONSTRUCTION, MORE IS REQUIRED THAN A CRYPTIC TWO-WORD REFERENCE TO "ANY ENTITY," TO FIND THAT CONGRESS INTENDED TO INVADE THE HISTORIC SOVEREIGN POWERS OF THE STATES.

Under the Nebraska/Eighth Circuit view, Congress' use of the modifier "any" in § 253(a), standing alone, is sufficient to find preemption of the historic powers of the States to control their own political subdivisions. In contrast, under the Iowa/D.C. Circuit view, the use of the modifier "any" in § 253(a), without more, is insufficient to find "unmistakably clear" congressional intent "to alter the 'usual constitutional balance between the States and the Federal Government.'" *Gregory*, 501 U.S. at 461 quoting *Atascadero*, 473 U.S. at 242. As discussed below, the Iowa/D.C. Circuit federal preemption analysis is the better reasoned view which comports with this Court's well-established "plain statement" rule of statutory construction.

The Nebraska Supreme Court's federal preemption analysis was erroneous for several reasons. First, while recognizing that a finding of federal preemption in this case would alter the delicate constitutional balance between the States and the Federal Government (App. 11; 265 Neb. at 78, 655 N.W.2d at 370-371), the Nebraska Supreme Court focused on the "plain meaning" of only the phrase "any entity," without considering the context in which that phrase was used in § 253(a), to the exclusion of all other applicable rules of statutory construction. Such an approach is contrary to this Court's "cardinal rule" of statutory construction "that a statute is to be read as a

whole, . . . since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). *See also, Holloway v. United States*, 526 U.S. 1, 7 (1999) ("[a]s we have repeatedly stated, '"the meaning of statutory language, plain or not, depends on context"'"). *Accord Buffalo Crushed Stone, Inc. v. Surface Transp. Bd.*, 194 F.3d 125, 129 (D.C. Cir. 1999) ("[c]ourts are not helpless captives when a literal application of statutory language would subvert a regulatory scheme" and where "such a conflict exists, it is appropriate to consider the purpose of the disputed provision and to construe the text accordingly"); and *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945) ("it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning") (Learned Hand, J.).

The Nebraska Supreme Court's reliance on the Eighth Circuit's reasoning in *Missouri Municipal League* led to a misapplication in this case of the controlling "plain statement" rule of statutory construction mandated by this Court in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and subsequent cases. Both the Nebraska court and the Eighth Circuit relied on the decisions in *Salinas v. United States*, 522 U.S. 52 (1997) and *United States v. Gonzales*, 520 U.S. 1 (1997), in concluding that Congress' use of the phrase "any entity" in § 253(a) was indicative of an expansive federal preemptive scope. (App. 11-12; 265 Neb. at 78-80, 655 N.W.2d at 370-372.) However, this Court's "plain statement" rule was irrelevant in those cases because

neither *Salinas* nor *Gonzales* involved any threat to the constitutional balance between the States and the Federal Government.

The *Salinas* case involved the application of the federal criminal bribery statute to officials of a Texas county. *Salinas*, 522 U.S. at 56. This Court in *Salinas* addressed the defendants' contention, based on *Gregory* and its progeny, that the federal bribery statute should apply only if the offense related to a county's receipt of federal funds. The statute in question, by its very terms, applied specifically to "an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof." *Id.* Thus, there was no question in *Salinas* that the federal bribery statute applied to state officers.

In fact, the *Salinas* Court found that defendants "ma[de] too much of *Gregory*," and questioned application of *Gregory*'s "plain statement" rule to the case, stating that "[n]o rule of construction . . . requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope." *Id.* at 59. This Court also found that "there is no serious doubt about the constitutionality of [the bribery statute] as applied to the facts of this case." *Id.* at 60. In other words, Congress' decision to criminalize activities engaged in by a county official did not serve to alter the constitutional balance between the States and the Federal Government.

The *Gonzales* case involved a criminal statute which posed no threat to the Federal-State balance. *Gonzales*, 520 U.S. at 4-5. The statutory construction issue in *Gonzales* was whether mandatory sentences required by 18 U.S.C. § 924(c) for certain drug trafficking offenses could run concurrently with "any other term of imprisonment."

Id. In *Gonzales*, this Court did not even cite to *Gregory* or its progeny, nor was there any suggestion that application of the statute would alter the constitutional balance between the States and the Federal Government.

The Nebraska Supreme Court thus clearly erred in relying on *Salinas* and *Gonzales*, in construing § 253(a). Neither *Salinas* nor *Gonzales* involved a substantive application of the "plain statement" rule to an ambiguous federal statute which "could be" read as invading the traditional powers historically reserved to the States.

In contrast, this Court recently rejected an expansive interpretation of the modifier "any," where to do so would have preempted a significant historic power of the States – sovereign immunity from suit. *Raygor v. Regents of University of Minnesota*, 534 U.S. 533 (2002). In *Raygor*, this Court considered whether the statute of limitations tolling provisions of 28 U.S.C. § 1367(d), which facially applied to "any claim" asserted under § 1367(d), applied to save state law claims asserted against state actors (the state university) in federal court. The *Raygor* Court held that the modifier "any" in § 1367(d), standing alone, was insufficient to find "unmistakably clear" congressional intent to alter the usual constitutional balance between the States and the Federal Government, reasoning:

> . . . When "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (quoting *Atascadero, supra*, at 242, 105 S.Ct. 3142). This principle applies when Congress "intends to pre-empt the historic powers of

> the States" or when it legislates in "'traditionally sensitive areas'" that "'affec[t] the federal balance.'" . . . In such cases, the clear statement principle reflects "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991).
>
> . . . .
>
> . . . [I]t is unclear if the tolling provision was meant to apply to dismissals for reasons unmentioned by the statute, such as dismissals on Eleventh Amendment grounds. . . . In sum, although § 1367(d) may not clearly exclude tolling for claims against nonconsenting States dismissed on Eleventh Amendment grounds, we are looking for a clear statement of what the rule *includes*, not a clear statement of what it *excludes*. See *Gregory*, 501 U.S., at 467, 111 S.Ct. 2395. Section 1367(d) fails this test. . . .

Raygor, 534 U.S. at 545-546 (emphasis in original) (some citations omitted).

The reasoning of this Court in *Raygor* demonstrates that the Nebraska Supreme Court's federal preemption analysis in this case was clearly wrong. Similar to *Raygor*, the question in this case is whether § 253(a) "states a clear intent" to preempt the historic powers of the States to regulate their own political subdivisions with respect to municipal entry into the private for-hire telecommunications field.

Like the "any claim" tolling provision considered in *Raygor*, "one could read" the "any entity" language of

§ 253(a) to include State political subdivisions, but this Court has "previously found similarly general language insufficient to satisfy clear statement requirements." *See Raygor*, 534 U.S. at 545. Although § 253(a) may not clearly exclude State political subdivisions from the "any entity" preemption provision, this Court has consistently "look[ed] for a clear statement of what the rule *includes*, not a clear statement of what it *excludes*." *Raygor*, 534 U.S. at 546, citing *Gregory*, 501 U.S. at 467 (emphasis in original). Section 253(a) "fails this test." *Raygor*, 534 U.S. at 546.

CONCLUSION

WHEREFORE, Petitioners the Nebraska Telecommunications Association and the Nebraska Cable Communications Association pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Nebraska Supreme Court in *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003). The identical issue raised herein is also presented to this Court in *Nixon v. Missouri Municipal League*, Case No. 02-1238 (filed February 18, 2003), and Petitioners respectfully suggest that, if the Court grants review in *Nixon*, this Petition should be granted and this case consolidated with

the *Nixon* case for briefing and oral argument on the merits.

Respectfully submitted,

Nebraska Telecommunications Association and Nebraska Cable Communications Association, Petitioners

JACK L. SHULTZ
GREGORY D. BARTON
HARDING, SHULTZ & DOWNS
800 Lincoln Square
121 S. 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 434-3000

Counsel of Record for Petitioners Nebraska Telecommunications Association and Nebraska Cable Communications Association

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

IN RE APPLICATION OF LINCOLN ELECTRIC SYSTEM.

LINCOLN ELECTRIC SYSTEM, LINCOLN, APPELLANT,
V.
NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, AND
NEBRASKA TELECOMMUNICATIONS ASSOCIATION ET AL.,
INTERVENORS-APPELLEES.

Case Caption

IN RE APPLICATION OF LINCOLN ELECTRIC SYSTEM

Filed January 10, 2003. No. S-01-286.

Appeal from the Nebraska Public Service Commission. Affirmed.

William F. Austin, of Erickson & Sederstrom, P.C., Douglas L. Curry, of Lincoln Electric System, Lincoln, and Mark J. Ayotte, of Briggs and Morgan, P.A., for appellant.

Jack L. Shultz and Gregory D. Barton, of Harding, Shultz & Downs, for intervenor-appellee Nebraska Telecommunications Association.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This is an appeal of an order of the Nebraska Public Service Commission (Commission) dismissing an application for contract carrier permit authority filed by Lincoln Electric System (LES). LES appeals, arguing the Commission erred in determining that LES lacked legal authority to provide contract carrier telecommunications services.

I. PROCEDURAL HISTORY

LES is an operating division of the city of Lincoln, a Nebraska municipal corporation and political subdivision of the State of Nebraska. On October 4, 2000, LES filed an application and request for authority with the Commission, seeking a contract carrier permit authorizing LES to provide competitive access transport services. In its application, LES sought authority to operate as a switchless facilities-based provider of dedicated digital information transmission services over its fiber optic network facilities to and from customer user points.

The application identifies LES as a citizen-owned electric utility serving a 190-square mile area surrounding the city of Lincoln. It states that LES provides electrical service to approximately 111,000 metered customers and also engages in wholesale power and energy transactions, including buying from and selling to other regional public utilities. According to the application, LES owns and maintains extensive fiber optic facilities located throughout its authorized electric service area, which are used to meet LES' telecommunications needs through the interconnection of its operations center, generation stations, and substations. LES sought contract carrier permit authority to allow it

> to fully utilize its existing fiber optic system for the benefit of the Lincoln area by making these facilities available on a non-exclusive basis to provide digital transmission to and from user points within its requested geographic service area, including services to other licensed telecommunications carriers as a provider of competitive access services.

LES stated in its application that its proposed telecommunications services would not make use of the local or

interexchange public switched telephone network and that it expected the proposed service to be "used primarily by business customers and governmental entities to meet their telecommunications needs."

The Nebraska Telecommunications Association (NTA) formally intervened in the matter. On November 9, 2000, the NTA filed a motion for declaratory relief alleging that LES lacked the legal authority to perform for-hire telecommunications services or to hold a contract carrier permit to perform such services. A hearing on the motion was held on December 11, 2000. On January 9, 2001, the Commission entered an order concluding that LES did not have legal authority to provide for-hire telecommunications services. The Commission reasoned that no statute gave LES the requisite authority and that Lincoln's home rule charter, strictly construed, contained no express grant of such authority. One concurring commissioner found that the city had the requisite authority pursuant to its home rule charter, but had not delegated such authority to LES. After its motion for rehearing was denied, LES filed this timely appeal.

II. ASSIGNMENTS OF ERROR

LES assigns that the Commission erred in (1) concluding that the charter of the city of Lincoln does not authorize the city to offer for-hire telecommunications services when such activity is not in contravention of any applicable constitutional or statutory provision; (2) applying a rule of strict construction, referred to as "Dillon's rule," to the limitation of powers charter under which the city of Lincoln currently operates and from which it derives its

primary authority; (3) declaring that Neb. Rev. Stat. § 15-201 (Reissue 1997) does not permit the city of Lincoln to provide for-hire telecommunications services; and (4) concluding that the city of Lincoln does not have the inherent authority to make the efficient business judgment of offering its unused fiber optic capacity for telecommunications purposes when it is engaged in the proprietary function of operating an electric utility.

III. STANDARD OF REVIEW

The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record. *In re Proposed Amend. to Title 291,* 264 Neb. 298, 646 N.W.2d 650 (2002); *In re Application No. C-1889,* 264 Neb. 167, 647 N.W.2d 45 (2002). When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Application of Neb. Pub. Serv. Comm.,* 260 Neb. 780, 619 N.W.2d 809 (2000).

Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.,* 263 Neb. 544, 641 N.W.2d 55 (2002); *Gernstein v. Lake,* 259 Neb. 479, 610 N.W.2d 714 (2000).

IV. ANALYSIS

1. Mootness and Preemption

The question of law presented by this appeal is whether the Commission erred in determining that LES lacked the legal authority to operate as a for-hire telecommunications carrier. During the pendency of this appeal, the Nebraska Legislature enacted 2001 Neb. Laws, L.B. 827. Certain sections of this bill, originally codified at Neb. Rev. Stat. §§ 75-604(5) and 86-2302(2) (Supp.2001), became effective on September 1, 2001. These statutes provided that the Commission "shall not issue . . . a permit . . . to an agency or political subdivision of the state" and that "[n]o agency or political subdivision of the state shall provide telecommunications services for a fee . . . or be issued . . . a permit as a telecommunications contract carrier." §§ 75-604(5) and 86-2302(2). We note that 2002 Neb. Laws, L.B. 1105, transfers § 75-604(5) to Neb. Rev. Stat. § 86-128(1)(b) (Cum.Supp.2002), operative January 1, 2003, without substantive change. In addition, 2002 Neb. Laws, L.B. 1105, transfers § 86-2302(2) to Neb. Rev. Stat. § 86-575(2) (Cum.Supp.2002), operative January 1, 2003, also without substantive change. Due to this recodification, we refer to the current statutes, rather than the statutes referenced by the parties. In its appellate brief and in a subsequently filed motion for summary dismissal, NTA asserted that the enactment of these statutory provisions rendered the issue presented by this appeal moot. LES filed an objection to the motion for summary dismissal and supporting brief in which it asserted that the pertinent provisions of L.B. 827 are preempted by the Telecommunications Act of 1996, 47 U.S.C. § 253 (2000), and are therefore unconstitutional under the Supremacy Clause of the U.S. Constitution. LES also addressed this

issue in its reply brief, filed a separate "Notice of Constitutional Question," and served copies of its briefs assigning the unconstitutionality of L.B. 827 pursuant to Neb. Ct. R. of Prac. 9E (rev.2000). The Attorney General has not entered an appearance or filed a brief on this issue.

Although we overruled the motion for summary dismissal, the mootness issue has now been fully briefed and is before us. A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Chambers v. Lautenbaugh,* 263 Neb. 920, 644 N.W.2d 540 (2002); *Wilcox v. City of McCook,* 262 Neb. 696, 634 N.W.2d 486 (2001). The Nebraska statutory provisions enacted after the Commission's order at issue in this case would clearly prohibit the city of Lincoln and LES from seeking authority as a telecommunications contract carrier. Unless LES is correct in its assertion that these statutory provisions are preempted by federal law, the single issue presented in this appeal would be moot. We therefore address the preemption issue.

The federal statute upon which LES bases its preemption argument provides in part:

> **(a) In general**
>
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service.
>
> **(b) State regulatory authority**
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements

> necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> **(c) State and local government authority**
>
> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(Emphasis supplied.) 47 U.S.C. § 253. Federal courts interpreting the statute generally hold that subsection (a) imposes a substantive limitation on state and local governments, while subsections (b) and (c) are "safe harbors" or exceptions to the general prohibition stated in subsection (a). See, *Missouri Mun. League v. F.C.C.,* 299 F.3d 949 (8th Cir. 2002); *New Jersey Payphone Ass'n v. Town of West New York,* 299 F.3d 235 (3d Cir. 2002); *BellSouth Telecommunications v. Town of Palm Beach,* 252 F.3d 1169 (11th Cir. 2001).

Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state laws that conflict with federal law are invalid. *Eyl v. Ciba-Geigy Corp.,* 264 Neb. 582, 650 N.W.2d 744 (2002), citing U.S. Const. art. VI, cl. 2. There are three varieties of preemption: express, implied, and conflict preemption. *Id.* Express preemption arises when Congress has explicitly declared federal legislation to have a preemptive effect. It can also arise when a federal agency, acting within the scope of authority conferred upon it by Congress, has

expressly declared an intent to preempt state law. *Id.* LES contends that express preemption arises from the plain language of 47 U.S.C. § 253(a) because it is an "entity" which Congress has determined may not be prohibited by the state from providing telecommunications services. Thus, it contends that §§ 86-128(1)(b) and 86-575(2) are preempted and unconstitutional. On the other hand, NTA argues that under rules governing federal statutory construction, the phrase "any entity" in 47 U.S.C. § 253(a) does not include municipalities which are traditionally subject to the overriding control of state legislatures, and thus the Nebraska statutes are not preempted. Both arguments are supported by case law.

NTA relies upon *City of Abilene, Texas v. F.C.C.,* 164 F.3d 49 (D.C. Cir. 1999), in which the U.S. Court of Appeals for the District of Columbia Circuit upheld a determination by the Federal Communications Commission (FCC) that § 253(a) did not preempt a Texas statute forbidding municipalities from providing telecommunications services. In its analysis, the court determined that § 253(a) must be construed in accordance with the precept enunciated in *Gregory v. Ashcroft,* 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991), because "[t]o claim . . . that § 253(a) bars Texas from limiting the entry of its municipalities into the telecommunications business is to claim that Congress altered the State's governmental structure." *City of Abilene, Texas,* 164 F.3d at 52. The precept of *Gregory, supra,* requires that if Congress intends to alter the usual constitutional balance between a state and its municipalities, it must make its intention "'"unmistakenly clear"'" in the language of the statute. *Gregory,* 501 U.S. at 460, quoting *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985)

(specific holding superseded by statute). In *City of Abilene, Texas,* the court concluded that there was no such clarity in § 253(a), reasoning that the term "'entity'" was not defined in the Telecommunications Act. 164 F.3d at 52. Noting that it was linguistically possible to include a municipality under the heading "entity," the court found that it was not enough under the *Gregory* standard that the statute *could* bear such meaning. *City of Abilene, Texas, supra.* Instead, the court focused on the fact that there was no textual evidence to suggest that Congress, in using the word "entity," deliberated over the effect such use would have on state-local governmental relationships. *Id.* Noting that *Gregory* requires construction of a statute in favor of state sovereignty when the text fails to indicate congressional intent to the contrary, the court held that § 253(a) did not preempt the Texas statutes. *City of Abilene, Texas, supra.*

A similar conclusion was reached by the Iowa Supreme Court in *Iowa Telephone Ass'n v. City of Hawarden,* 589 N.W.2d 245 (Iowa 1999). In that case, the court began its analysis with the "plain-statement rule" derived from *Gregory, supra,* that "the courts will not interpret a federal statute in such a way as to intrude upon an area traditionally regulated by the states absent a clear expression of congressional intent to do so." *City of Hawarden,* 589 N.W.2d at 251. Relying on the decision of the FCC in *City of Abilene, Texas* (which was affirmed on appeal by the D.C. Circuit Court as discussed above), the Iowa court held without significant additional analysis that § 253(a) did not prevent the State of Iowa from regulating the provision of telecommunications services by its political subdivisions.

Subsequent to the decisions in *City of Abilene, Texas, supra,* and *City of Hawarden, supra,* two courts have reached the opposite conclusion. In *City of Bristol, VA. v. Earley,* 145 F. Supp. 2d 741 (W.D. Va. 2001), a municipality sought a declaratory judgment that a Virginia statute prohibiting local governmental entities from offering telecommunications services to the general public was preempted by § 253(a). The court acknowledged that the challenged law related to the relationship between states and their political subdivisions, an area traditionally regulated by states. It also affirmed the principle that when a federal statute touches on an area traditionally within the exclusive control of states, Congress must make its intention to preempt "'clear and manifest'" based on *Gregory v. Ashcroft,* 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991). *Earley,* 145 F. Supp. at 747. However, guided by Supreme Court decisions holding that the use of the modifier "any" denoted an unambiguous legislative intent to impart an expansive scope to a statutory term, the district court determined that Congress' use of the phrase "'any entity'" made it "'clear and manifest'" that § 253(a) was intended to have sweeping application, including application in those areas in which states traditionally enjoyed exclusive regulatory power. 145 F. Supp. at 747, citing *Salinas v. United States,* 522 U.S. 52, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997), and *United States v. Gonzales,* 520 U.S. 1, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997). On this basis, the court held that the Virginia statute was preempted by § 253(a) and therefore invalid and unenforceable under the Supremacy Clause.

In *Missouri Mun. League v. F.C.C.,* 299 F.3d 949 (8th Cir. 2002), released after the instant case was argued and submitted, the U.S. Court of Appeals for the Eighth

Circuit employed similar reasoning to conclude that a Missouri statute which prevented municipalities and municipally owned utilities from providing telecommunications services or facilities was preempted by § 253(a). In vacating an FCC order which relied heavily upon *City of Abilene, Texas v. F.C.C.*, 164 F.3d 49 (D.C. Cir. 1999), the court acknowledged its responsibility under *Gregory, supra,* to determine whether the statutory language plainly requires preemption. Focusing on the phrase "'any entity,'" the court determined that the plain meaning of the term "'entity'" included all business or governmental organizations, including municipalities. *Missouri Mun. League,* 299 F.3d at 953. Noting that "[t]ime and time again the Court has held that the modifier 'any' prohibits a narrowing construction of a statute," *id.* at 954, the court concluded that "Congress's use of [the term] 'any' to modify 'entity' signifies its intention to include within the statute all things that could be considered as entities." *Id.* at 953-54, citing, inter alia, *Gonzales, supra,* and *Salinas, supra.* Specifically rejecting the reasoning of *City of Abilene, Texas,* the court in *Missouri Mun. League* stated:

> The court, however, made no mention of the Supreme Court's cases regarding the effect of the modifier "any" on the modified term, referring instead to Congress's "tone of voice" regarding the term "any" and the "emphasis" Congress meant to place on different words. [Citation omitted.] . . . Whatever the reason for the D.C. Circuit's decision not to consider and discuss *Salinas* and like cases, we view the lack of such a discussion as detracting from the persuasiveness of its opinion. The Supreme Court has repeatedly instructed us regarding the proper manner of interpreting the modifier "any," and we follow that direction here.

299 F.3d at 955. The court therefore concluded that municipalities are included within the phrase "any entity" as used in § 253(a).

Under the Supremacy Clause of the U.S. Constitution, state courts have a concurrent duty to enforce federal law. *Howlett v. Rose,* 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990); *Preister v. Madison County,* 258 Neb. 775, 606 N.W.2d 756 (2000). The Supreme Court has not addressed the specific preemption issue before us, and in the absence of an interpretation of § 253(a) by the Court, we are not bound by any circuit court's interpretation. See *In re Search Warrant for 3628 V. St.,* 262 Neb. 77, 628 N.W.2d 272 (2001). See, also, *Lockhart v. Fretwell,* 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) (Thomas, J., concurring) (state courts bound by Supreme Court's interpretation of federal law, but not bound by circuit court's interpretation); *Bromley v. Crisp,* 561 F.2d 1351 (10th Cir. 1977) (state courts may express differing views on federal questions until guided by binding decision of Supreme Court). Here, we are persuaded by the reasoning of the Eighth Circuit that under the rule of statutory construction applied by the Supreme Court in *Salinas v. United States,* 522 U.S. 52, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997), and other cases, Congress' use of the phrase "any entity" in § 253(a) is indicative of an expansive statutory scope which includes a governmental entity, such as a municipally owned utility, seeking to provide telecommunications services. We conclude that §§ 86-128(1)(b) and 86-575(2) are absolute prohibitions which, as a matter of law, do not fall within the "safe harbor" provisions in § 253(b) and (c). Therefore, by virtue of the Supremacy Clause, §§ 86-128(1)(b) and 86-575(2) are preempted by federal law and are unconstitutional.

2. Authority to Operate as Telecommunications Carrier

Having concluded that LES is not *prohibited* by state law from seeking a certificate of public convenience and necessity to operate as a telecommunications carrier, we must now consider whether it is *authorized* to do so.

(a) Statutory Authority

LES assigns that the Commission erred in declaring that § 15-201 does not permit the city of Lincoln to provide for-hire telecommunications services. This assignment, however, is not argued in the brief filed by LES. Errors that are assigned but not argued will not be addressed by an appellate court. *Caruso v. Parkos,* 262 Neb. 961, 637 N.W.2d 351 (2002); *Nicholson v. General Cas. Co. of Wis.,* 262 Neb. 879, 636 N.W.2d 372 (2001).

(b) Charter Authority of City of Lincoln

LES also contends that the home rule charter of the city of Lincoln confers authority on LES to provide for-hire telecommunications services. This charter was adopted in 1917 pursuant to article XI, § 2, of the Constitution of the State of Nebraska. This provision of our constitution, adopted in 1912, permits a city having a population of more than 5,000 to "frame a charter for its own government, consistent with and subject to the constitution and laws of this state." Neb. Const. art. XI, § 2.

A charter defining powers and duties is essential to the creation and existence of a municipal corporation. 2A Eugene McQuillin, The Law of Municipal Corporations § 9.01 (3d ed. 1996). Historically, states were viewed as

possessing all powers necessary for the protection of the general public, and thus a municipality or local city government could exercise only those powers specifically granted to it by the sovereign state. See *id.* A legislature's grant of powers to a municipality is often referred to as a "legislative charter." See *id.*, § 9.07 at 177. Legislative grants of power are strictly construed pursuant to what has become known as Dillon's rule, which provides:

> "[A] municipal corporation possesses and can exercise these powers only: (1) Those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable."

Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 69-70, 189 N.W. 643, 650 (1922).

In 1875, the home rule charter was originated by the constitution of Missouri. 2A McQuillin, *supra,* § 9.08. Other states, including Nebraska, adopted similar state constitutional provisions allowing for the adoption of home rule charters. See Neb. Const. art. XI, § 2. The purpose of a home rule charter is to render the city as nearly independent as possible from state interference. *Mollner v. City of Omaha,* 169 Neb. 44, 98 N.W.2d 33 (1959); 2A McQuillin, *supra,* § 9.08. Legally, a home rule charter is simply another method of empowering a municipality to govern its own affairs. See *id.* While a legislative charter emanates from the sovereign legislature, a home rule charter has as its basis a constitutional provision enacted by the sovereign people authorizing the electorate to empower municipalities with the authority to govern their own affairs. See *id.* While legislative charters are always

grants of power that are strictly construed, home rule or constitutional charters may be either grants of power or limitations of power. 2A McQuillin, *supra.*

As noted, the Nebraska Constitution authorized the city of Lincoln to adopt a home rule charter. Neb. Const. art. XI, § 2. The question of the nature and extent of the power granted to the electorate of a city by this constitutional provision was addressed by this court in *Consumers Coal Co., supra.* In that case, the plaintiff argued that there was no legal authority permitting the city to operate a public market for the purchase and sale of coal and wood. After examining the language of the Nebraska Constitution authorizing the adoption of home rule charters, we stated:

> We hold that the city may by its charter under the Constitution provide for the exercise by the council of every power connected with the proper and efficient government of the municipality, including those powers so connected, which might lawfully be delegated to it by the legislature, without waiting for such delegation. It may provide for the exercise of power on subjects, connected with municipal concerns, which are also proper for state legislation, but upon which the state has not spoken, *until* it speaks.

(Emphasis in original.) *Consumers Coal Co.,* 109 Neb. at 58-59, 189 N.W. at 646. We further held that "it was within the competency of the electorate of the city of Lincoln to adopt a charter which under settled principles of construction would be a limitation as distinguished from a grant of power." *Id.* at 66, 189 N.W. at 649. To determine what the people of the City of Lincoln did "'with the sovereignty acquired by the adoption of a home rule charter,'" we held that it was necessary to examine the

particular charter adopted in order to determine its effect. *Id.* A similar analysis is necessary in the instant case.

At the time *Consumers Coal Co.* was decided in 1922, article II, § 1, of the Lincoln Charter provided that "'[w]ithout denial or disparagement of other powers held under the Constitution and laws of the state, the city of Lincoln shall have the right and power'" to perform specifically enumerated functions. *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, 67, 189 N.W. 643, 649 (1922). Based upon this language, we concluded that the charter was within that class of home rule charters that are construed to be grants of power, rather than limitations of power. As such, it was subject to the same principle of strict construction that was applicable to legislative grants of municipal charters. Finding no express grant of power authorizing the city to operate a private coal and wood market in the charter language, we concluded that the city lacked the authority to do so.

Article II of the Lincoln Charter, as amended in 1992, is significantly different. It provides in relevant part:

> The City of Lincoln shall have the right and power to exercise all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever that it is possible for it to have at the present and in the future under the constitution of the State of Nebraska, except as prohibited by the state constitution or restricted by this charter, and to exercise any powers which may be implied thereby, incidental thereto, or appropriate to the exercise of such powers. The city shall also have the right and power to exercise all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever that now are, or hereafter may be,

> granted by the laws of the State of Nebraska to all cities and villages or applicable to cities of the primary class, provided that such laws are not inconsistent with this charter.

Lincoln Charter, art. II, § 1, approved by voters on May 12, 1992. Unlike the 1922 charter, the broad language in this current charter does not merely enumerate specified powers, but, rather, grants all powers possible to the city. We conclude that the present charter is a limitation of powers charter, not a grant of powers charter. As such, the rule of strict construction, or Dillon's rule, does not apply, and the Commission erred in examining the charter language for an express or implied grant of power. See, *Consumers Coal Co., supra;* 2A Eugene McQuillin, The Law of Municipal Corporations § 9.08 (3d ed. 1996). To determine whether the city of Lincoln possesses the requisite power to operate as a for-hire telecommunications carrier, we need only consider whether the charter's broad authorization to engage in municipal powers and functions encompasses the provision of for-hire telecommunications services.

(c) Is Provision of Proposed Services a Municipal Power?

NTA contends that the charter grants the city only "strictly municipal" powers. Brief for appellee at 31. It argues that the provision of for-hire telecommunications does not fall within this definition and is therefore precluded. LES, in contrast, argues that the limitation of powers charter grants the city all powers "'which might lawfully be delegated to the municipality by the legislature.'" Brief for appellant at 26. Because the Legislature could confer authority to engage in for-hire telecommunications upon the city, LES contends that it, as an operating

division of the city, necessarily possesses that authority. We conclude that NTA's interpretation of the powers granted by a limitation of powers charter is too narrow, while LES' is too broad.

NTA's contention that a limitation of powers charter grants a city authority in only matters of "strictly municipal" concern is based upon a misinterpretation of our prior law and a mischaracterization of the legal issue presented in this case. NTA relies upon cases interpreting the "subject to the constitution and laws of this state" language in Neb. Const. art. XI, § 2. This language requires that a provision of a home rule charter must yield to a conflicting state statute, unless the provision relates to a matter of "strictly municipal" concern. E.g., *Jacobberger v. Terry,* 211 Neb. 878, 320 N.W.2d 903 (1982). Contrary to NTA's assertions, however, this analysis does not mean that a home rule city may act in only those areas that are "strictly municipal." Instead, such an entity may act in all matters necessary or incidental to its government, although municipal action will take precedence over conflicting state action only if the matter is one of strictly local concern. See, *id.*; *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, 189 N.W. 643 (1922).

NTA also misconstrues the legal issue present in the instant case. It contends that the state's regulation of telecommunications services through the Commission necessarily establishes that this is an area of statewide concern and that a municipality therefore cannot, pursuant to its home rule charter, act in a conflicting manner. This rationale would be applicable if LES was attempting to *regulate* the telecommunications field. However, the issue in this case is whether LES has the legal authority to *provide* for-hire telecommunications services pursuant

to the Lincoln home rule charter. In the instant case, there is no question that if LES may lawfully provide the services, it is subject to regulation by the Commission. Compare *Omaha & C.B. Street R. Co. v. City of Omaha,* 125 Neb. 825, 252 N.W. 407 (1934) (holding home rule charter did not authorize city to regulate bus service contrary to state regulation). There is no conflict between state law and the charter in this case, and therefore the "strictly municipal" analysis is inapplicable.

LES' interpretation of the powers granted by a limitation of powers charter in Nebraska is incorrect because in *Consumers Coal Co.,* we recognized that such a charter adopted pursuant to the Nebraska Constitution does not grant "unlimited" power to a city. Quoting *State ex rel. v. Telephone Co.,* 189 Mo. 83, 88 S.W. 41 (1905), we held:

> "But it is not every power that may be essayed to be conferred on the city by such a charter that is of the same force and effect as if it were conferred by an act of the general assembly, *because the Constitution does not confer on the city the right, in framing its charter, to assume all the powers that the state may exercise within the city limits, but only powers incident to its municipality*; yet the Legislature may, if it should see fit, confer on the city powers not necessary or incident to the city government. There are governmental powers the just exercise of which is essential to the happiness and well being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city, but until so delegated they are reserved. *The words in the Constitution, 'may frame a charter for its own government,' mean may frame a charter for the government of itself as a city, including all that is necessary or incident to the government of*

> *the municipality, but not all the power that the state has for the protection of the rights and regulation of the duties of the inhabitants in the city, as between themselves.*"

(Emphasis supplied.) *Consumers Coal Co.,* 109 Neb. at 57, 189 N.W. at 645. Thus, the city may exercise every power "*connected with the proper and efficient government of the municipality, including those powers so connected,* which might lawfully be delegated to it by the legislature, without waiting for such delegation." (Emphasis supplied.) *Id.* at 58-59, 189 N.W. at 646. See, *Michelson v. City of Grand Island,* 154 Neb. 654, 48 N.W.2d 769 (1951); *Axberg v. City of Lincoln,* 141 Neb. 55, 2 N.W.2d 613 (1942). Pursuant to the "for its own government" limitation in our constitution, see article XI, § 2, the question is not whether the Legislature could have delegated the authority to provide for-hire telecommunications services to the city of Lincoln. Rather, the question is whether the provision of for-hire telecommunications services is an area that is necessary, incidental, or connected with the proper and efficient government of the municipality of the city of Lincoln.

As we noted in *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, 58, 189 N.W. 643, 646 (1922), resolution of this question is difficult for "[i]t is not easy in all cases to distinguish between municipal powers and state powers. . . . " Due to the difficult nature of the question, we must "content ourselves with the consideration of each case as it arises, applying those principles which precedent and logic approve." *Id.*

Our precedent indicates that a city's provision of retail services can be necessary or incidental to its proper and efficient government. This is particularly true in those circumstances where retail services are directly related to

the provision of a public service. In *Consumers Coal Co.,* we impliedly held that the operation of a public market for the sale of wood and coal by the city was necessary or incidental to the proper and efficient government of the city. Four years later, we reached a similar conclusion in *Standard Oil Co. v. City of Lincoln,* 114 Neb. 243, 207 N.W. 172 (1926). In that case, an amendment to the Lincoln home rule charter expressly granted the city the power to engage in the business of selling gasoline and oil to the inhabitants of the city. The constitutionality of the amendment was challenged by a local business on the ground, inter alia, that the sale of gasoline and oil by the city "'is not of, and does not pertain to, the government of said defendant city.'" *Id.* at 246, 207 N.W. at 173. We rejected the plaintiff's argument, noting that the use of the commodity of gasoline had so steadily increased that it was "well-nigh universal" and that thus, its provision by the city was for a public purpose. *Id.* at 251, 207 N.W. at 175. We held that the charter provision delegated power to the city so that it "may do that which the state may do." *Id.* at 252, 207 N.W. at 176.

Consideration of our precedent and the dictates of logic lead us to conclude that the provision of for-hire telecommunications services by the city of Lincoln is incidental to or connected with its powers of municipal government granted under its limitation of powers charter. Although the charter does not grant the city authority to do all that the state could do, provision of for-hire telecommunications, much like the provision of gasoline, serves a public purpose that is sufficiently related to the government of the municipality of the city of Lincoln. See *Standard Oil Co., supra.* The city seeks to provide telecommunications services by making efficient use of the

facilities it already uses to provide public utilities, thus providing a further connection between the provision of for-hire telecommunications services and the necessary and incidental powers of municipal government. See, also, *Speidell Monuments v. Wyuka Cemetery,* 242 Neb. 134, 493 N.W.2d 336 (1992) (finding cemetery organized as public corporation had implied power to sell grave markers and monuments); *Nelson-Johnston & Doudna v. Metropolitan Utilities District,* 137 Neb. 871, 291 N.W. 558 (1940) (finding metropolitan utilities district empowered to engage in business of supplying water and gas had implied authority to sell gas appliances).

Based upon the foregoing, the Commission erred as a matter of law in determining that the city of Lincoln lacked the legal authority to engage in the provision of for-hire telecommunications services.

3. AUTHORITY OF LES

The remaining question is whether the city of Lincoln has properly delegated its authority to provide for-hire telecommunications services to LES. LES is an operating division of the city of Lincoln. The Lincoln City Council gives LES all of its powers and responsibilities by ordinance. According to Lincoln Mun. Code § 4.24 (2001), LES is governed by the LES administrative board. Section 4.24.060 of the code sets forth the general powers and duties of the administrative board and provides in pertinent part: "The Lincoln Electric System Administrative Board shall have general control of the Lincoln Electric System of the City of Lincoln including the responsibility for the control and management of the property, personnel, facilities, equipment, and finances of said Lincoln Electric

System." Section 4.24.070, which addresses the specific powers and duties granted to the board, further states: "The Board shall . . . (e) Do and perform all other acts necessary to efficiently maintain and operate the Lincoln Electric System including the management of the property, personnel, facilities and finances of the Lincoln Electric System, except those otherwise limited by the provisions of the ordinance."

LES argues that "[i]nherent in these provisions is the Administrative Board's mandate to maximize the use of all of LES's resources in order to efficiently manage its property and finances." Brief for appellant at 29. LES contends that productive use of its unused fiber optic network falls within this mandate and that thus, the city council has authorized LES to engage in for-hire telecommunications services.

We disagree. LES is clearly authorized to provide electric service to citizens and businesses in Lincoln and the surrounding area in its capacity as a public utility. To the extent management of LES facilities and property relates to the provision of electric service, the city has delegated such authority to the LES board. However, use of LES' facilities or property for an entirely different purpose, i.e., the provision of for-hire telecommunications services, is not a use that can be fairly considered to be within the powers delegated to LES by the city. This is especially true because the ordinance gives the LES board the power to perform all acts *necessary* to the efficient operation of the electric system. The record does not reflect that the use of excess fiber optic capacity for the provision of for-hire telecommunications services is *necessary* to the efficient operation of the electric system. Therefore, the city of Lincoln has not, at this time, properly delegated

authority to LES to utilize the excess fiber optic capacity for the provision of for-hire telecommunications services.

V. CONCLUSION

For the foregoing reasons, §§ 86-128(1)(b) and 86-575(2) are preempted by federal law and are therefore unconstitutional under the Supremacy Clause of the U.S. Constitution. The current Lincoln home rule charter is a limitation of powers charter, and the Commission erred in applying a rule of strict construction to such charter. The Commission further erred as a matter of law in finding that the city of Lincoln lacked the legal authority to provide for-hire telecommunications services. However, because LES has not been authorized by ordinance to seek regulatory authority to provide such services, the Commission properly denied its application. We therefore affirm the denial of the application on grounds other than those relied upon by the Commission majority.

AFFIRMED.

SECRETARY'S RECORD,
NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application of Lincoln Electric System, Lincoln, seeking contract carrier permit authority.	) Application No. C-2400) ORDER GRANTING NTA'S MOTION FOR DECLARATORY RULING) Entered: January 9, 2001

BY THE COMMISSION:

By its application filed October 4, 2000, Lincoln Electric System (LES or Applicant) of Lincoln, Nebraska, seeks contract carrier permit authority. Notice of the application appeared in *The Daily Record*, Omaha, Nebraska on October 5, 2000, pursuant to the rules of the Commission.

Formal interventions were filed by Aliant Communications Co., d/b/a Alltel; Arlington Telephone Company; AT&T; Blair Telephone Company; Clarks Telecommunications Co.; Citizens Telecommunications Company of Nebraska; Cox Nebraska Telcom, LLC; Curtis Telephone Company, Inc.; Dalton Telephone Company, Inc.; Diller Telephone Company; Eastern Nebraska Telephone Company; Elsie Communications, Inc.; Eustis Telephone Exchange, Inc.; Hamilton Telephone Company; Hartington Telecommunications Co., Inc.; Henderson Cooperative Telephone; Hershey Cooperative Telephone Company; Hooper Telephone Company; Home Telephone Company of Nebraska; K&M Telephone Company, Inc.; Keystone-Arthur

Telephone Company; Nebraska Central Telephone Company; Nebraska Telecommunications Association; Northeast Nebraska Telephone Company; NT&T; Pierce Telephone Company, Inc.; Qwest Corporation; Rock County Telephone Company; Stanton Telecom, Inc.; Southeast Nebraska Telephone Company and UtiliCorp Communications Services, Inc. (collectively, Intervenors). Formal protests were filed by Time Warner Cable Nebraska Division and the Nebraska Cable Communications Association. Letters in support were filed by Pacific Media, LLC; Pacific Engineering, Inc. and RWK, Inc.

On November 9, 2000, Nebraska Telecommunications Association (NTA) submitted a Motion for Declaratory Ruling challenging LES' legal authority to provide for-hire telecommunications services in the state of Nebraska. NTA's motion asks the Commission to declare as a matter of law that the City of Lincoln, d/b/a Lincoln Electric System, is not authorized to offer for-hire telecommunications services or to hold a contract carrier permit to perform such services because it lacks the required legal authority.

A hearing on the NTA motion was held December 11, 2000, in the Commission Hearing Room. Attorneys Jack L. Shultz and Gregory D. Barton appeared on behalf of the NTA. Attorneys Mark J. Ayotte and Douglas L. Curry appeared on behalf of LES. Each party presented their respective arguments on NIA's Motion for Declaratory Ruling, and the matter was submitted for decision by the Commission at the conclusion of the December 11, 2000, oral arguments.

FACTUAL BACKGROUND

NTA is a non-profit corporation organized under the laws of Nebraska, with offices located in Lincoln, Nebraska. A majority of NTA's members hold certificates of public convenience and necessity as telephone common carriers providing intrastate telecommunications service, including local exchange service and non-switched digital transmission services, at various locations throughout the state of Nebraska.

LES is an operating division of the City of Lincoln, a Nebraska municipal corporation and political subdivision of the state of Nebraska. LES filed an application, seeking authority from this Commission to provide non-switched digital transmission telecommunications services in and around Lincoln, Nebraska, as a contract carrier. In its application, LES asserted that it possesses authority to provide contract carrier telecommunications services pursuant to *Neb. Rev. Stat.* § 15-201(6) and the Lincoln City Charter.

NTA formally intervened in this case to oppose the LES application. NTA contends that LES is a municipal corporation and political subdivision of the state which lacks the legal capacity to provide for-hire contract carrier telecommunications services.

DISCUSSION

In support of its Motion for Declaratory Ruling, NTA contends that LES does not have the legal authority to provide for-hire contract carrier telecommunications services because: (1) there is no express statutory grant of such authority; and (2) the "general welfare" powers conferred by the City of Lincoln's home rule charter grant

only strictly municipal powers which can readily be overridden by state law.

LES countered by stating that the City of Lincoln has primary authority granted under its home rule charter to exercise any municipal power, function, right, privilege or immunity that is possible for it to have, independent of any other statutory authority.

In analyzing the powers exercisable by a municipality in Nebraska, there are a number of relevant rules which generally fall within the rubric of "Dillon's Rule." Under "Dillon's Rule," municipal corporations, like LES, "are purely entities of legislative creation" and, "[u]nlike natural persons they can exercise no power except such as has been expressly delegated to them, or such as may be inferred from some express delegated power essential to give effect to that power." *Metropolitan Utilities Dist. v. City of Omaha*, 171 Neb. 609, 107 N.W.2d 397 (1961). *See also, Fitzke v. City of Hastings*, 255 Neb. 46, 582 N.W.2d 301 (1998) (affirming trial court's invalidation of county zoning action under "well-settled rule" that a municipal corporation "possesses, and can exercise, the following powers, *and no others*: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation – *not simply convenient*, but indispensable") (emphasis added); *Briar West, Inc. v. City of Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980) (the "rule has long been established in this state that a municipal corporation may exercise only such powers as are expressly granted, those necessarily or fairly implied in or incidental to powers expressly granted, and those essential to the declared objects and purposes of the municipality"); and *United*

Community Services v. Omaha Nat. Banks, 162 Neb. 786, 77 N.W.2d. 576 (1956) (public power district lacked power to make charitable pledges because companies "chartered for the purpose of supplying the public with electricity . . . have such lawful rights and powers as are clearly and expressly granted, together with such implied . . . powers as are reasonably . . . necessary to enable them to exercise those expressly conferred" and "*[a]ll rights and powers not thus granted are withheld*") (Emphasis added).

In order to determine whether LES has the legal capacity to provide for-hire contract carrier telecommunications services, it is necessary to review statutes governing cities of the "primary class," and local charter provisions and ordinances, to determine whether any such provision gives LES the express or necessarily implied authority to engage in for-hire contract carrier telecommunications services. In engaging in this review, it is important to keep in mind the long-standing rule of statutory construction that "[s]tatutes granting powers to municipalities are to be strictly construed, and where doubt exists, such doubt must be resolved against the grant." *Briar West, Inc.*, 206 Neb. at 176, 291 N.W.2d at 732.

The relevant statutory authority upon which LES relies is set forth in *Neb. Rev. Stat.* § 15-201 (Reissue 1997), which provides in pertinent part:

> Cities of the primary class shall be bodies corporate and politic and shall have power:
>
> . . .
>
> (6) To purchase, construct, and otherwise acquire, own, maintain, and operate public service and public utility property and facilities

> within and without the limits of the city . . . and to exercise such other and further powers as may be necessary or incident or appropriate to the powers of such city, including powers granted by the Constitution of Nebraska or exercised by or pursuant to a home rule charter adopted pursuant thereto. . . .

At first blush, one may be tempted to conclude that the power granted in § 15-201(6), to "operate public service and public utility property and facilities," authorizes LES to provide telecommunications services. However, there is an elementary distinction between acting as a "public utility" and acting as a "private enterprise." *See, e.g., In Re Application No. 30466*, 194 Neb. 55, 230 N.W.2d 190 (1975) (a "public utility is obligated to serve *all* its ratepayers fairly and without undue discrimination" because "[c]orporations which devote their property to a public use *may not pick and choose*, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions") (emphasis added). *Accord*, Black's Law Dictionary 1108-1109 (5th Ed. 1979) (defining term "public utility" as meaning an "[a]gency, instrumentality, business industry or service which is used or conducted in such manner as to affect the community at large, that is, which is *not limited or restricted to any particular class of the community*," and the "devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately") (emphasis added).

Since LES is seeking "contract" carrier authority, under which LES would not be authorized to serve the community at large, by definition, LES' application requests

authority to act as a telecommunications "private enterprise" service, and *not* as a telecommunications "public utility" service.[1] Thus, the power granted in *Neb. Rev. Stat.* § 15-201(6) (Reissue 1997), to "operate public service and public utility property and facilities," only grants LES the power to act as a "public utility, and clearly does not authorize LES to operate a telecommunications "private enterprise" service.

At pages 10-11, 18, 21, 24 and 26 of its brief, LES makes the argument that the Nebraska Legislature specifically authorized LES to provide for-hire telecommunications services because the *definition* of the term "telecommunications company" is statutorily-defined to mean, among other things, a "governmental entity" which offers "telecommunications service for a fee in Nebraska intrastate commerce." *Neb. Rev. Stat.* § 86-802(16). However, it is clear to the Commission that there is nothing in this statutory *definition* which purports to grant legal authority to any public or private entity to engage in for-hire telecommunications services in Nebraska intrastate commerce. It is equally clear to this Commission that the provisions of *Neb. Rev. Stat.* § 86-802(16) merely define and recognize that a telecommunications company can take many forms. Section 86-802(16) does not specifically authorize LES (or any other public or private entity) to

[1] In fact, LES has expressly disclaimed any interest in serving the community at large, stating that, "[w]hile it is true LES provides electric service as a public utility, there is no requirement that it also provide telecommunications services as a common carrier." (LES' brief, at p. 18). LES has thus recognized the basic distinction between serving as a "public utility" and serving as a "retail entity," and LES does not seek to provide service as a public utility under its Application.

provide for-hire telecommunications services.[2] Unlike LES, some political subdivisions, such as counties, are expressly authorized to establish public telephone systems. *See*, *Neb. Rev. Stat.* §§ 86-401 to 86-412. The City of Lincoln/LES has no similar express statutory authorization.

The final potential source of authority for Lincoln/LES is the Lincoln Home Rule Charter. However, it is elementary that the provisions of a municipality's home rule charter are subject to, and must be consistent with, the Constitution and laws of Nebraska. *See, e.g., Retired City Gov. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys.*, 199 Neb. 507, 260 N.W.2d 472 (1977). Further, "when it comes to a construction of the powers delegated by that charter to the city government, the rule of strict construction still obtains." *Consumers' Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N.W. 643 (1922).

The general powers granted to the City of Lincoln are set forth in Article II, §1 of the Charter, which provides in relevant part:

> The City of Lincoln shall have the right and power to exercise all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever that it is possible

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[2] LES' invocation of the Commission's Rule requiring any "person, firm, partnership, . . . corporation, cooperative, *political subdivision*, or association" to first make application for and receive authority from the commission before offering any telecommunications service, *see*, NEB. ADMIN. CODE, Title 291, Ch. 5, §002.49A (emphasis added), is misplaced.. In adopting §002.49A, this Commission was merely recognizing the obvious – that a telecommunications company can take many legal forms.

> for it to have at the present and in the future under the constitution of the State of Nebraska, except as prohibited by the state constitution, or restricted by this charter, and to exercise any powers which may be implied thereby, incidental thereto, or appropriate to the exercise of such powers. The city shall also have the right and power to exercise all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever that now are, or hereafter may be, granted by the laws of the State of Nebraska to all cities and villages or applicable to cities of the primary class, provided that such laws are not inconsistent with this charter.
>
> The city shall have the right and power to make such ordinances, by-laws, rules, and regulations, except as prohibited by the state constitution or restricted by this charter, as may be necessary or expedient for maintaining the peace, good government, and welfare of the city, its trade, commerce and manufacturing, and for preserving order, securing persons or property from violence, danger, and destruction, for protecting public and private property, for promoting the public health, safety, convenience, comfort, morals, and general interests and welfare of the inhabitants of the city and to enforce all such ordinances by providing for the fine or imprisonment, or both the fine and imprisonment, of those convicted of violations thereof.

The ordinances establishing LES's Administrative Board and delineating that Board's powers are located in Chapter 24 of the Lincoln Municipal Code. Under *Lincoln Mun. Code* § 4.24.010, the Board "is assigned the responsibility for the control and management of the property,

personnel, facilities and equipment, and finances of the Lincoln Electric System." *See also, Lincoln Mun. Code* § 4.24.060 (power to appoint chief executive, manager and other employees "as maybe necessary for the efficient and economical management of the said electric system"). The Board's specific "powers and duties" are set forth in *Lincoln Mun. Code* § 4.24.070, under which the Board has the power to:

> (b) Purchase and contract for all materials, parts, services, supplies, and equipment required by Lincoln Electric System . . .
>
> . . .
>
> (e) Do and perform all other acts necessary to maintain and operate the Lincoln Electric System including the management of the property, personnel, facilities and finances of the Lincoln Electric System, except those otherwise limited by the provisions of this ordinance . . .

As the foregoing demonstrates, there is no statute, charter provision[3] or ordinance which expressly grants to LES the power to engage in the for-hire telecommunications business. The closest any of these legislative acts come to granting such authority is the power to "purchase, construct, and otherwise acquire, own, maintain, and operate public service and public utility property and

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[3] LES claims that the power to operate a public utility electric system translates into an additional power to provide for-hire telecommunications services. There is no basis to imply a power to provide contract carrier telecommunications service from an expressly granted power to operate a public utility electric system.

facilities within and without the limits of the city," set forth in *Neb. Rev. Stat.* § 15-201(6).

However, as discussed above, there is a fundamental difference between the power to establish a telecommunications public utility and the power to enter that field as a private enterprise. That is precisely the conclusion reached by the Nebraska Supreme Court in the factually, comparable *Consumers' Coal Co.* case. There, a private retail fuel business brought an action to enjoin the City of Lincoln from operating a fuel yard "for the purpose of purchasing coal and wood at remote points of supply, having it shipped to the city of Lincoln and sold at retail to the inhabitants thereof." *Consumers' Coal Co.*, 109 Neb. at 53, 189 N.W. at 644. The trial court sustained the City's demurrer and the plaintiff retail fuel business appealed.

On appeal, the City claimed it had authority to operate a retail fuel yard pursuant to a state statute and a City charter provision. The statutory provision at issue granted the City the power to "establish and maintain a heating and lighting system for such city." The charter provision relied upon by the City, what was then Section 11, Article VIII, granted the City the "power to purchase, construct and otherwise acquire, own, and operate gas and electric plants and properties for the purpose of supplying the city and the inhabitants thereof with such service and utilities, and to purchase, lease, construct and otherwise acquire, own, and operate . . . telephone plants, lines and systems, and any and all other public service plants and properties, for the purpose of supplying the city and the inhabitants thereof with such service and public utilities." *Id.* Based upon these statutory and charter provisions, the City argued on appeal that, since the power to furnish heat was expressly granted to the City, the general grant

of legislative power in Article 1, Section II of the Charter delegated to the council the discretion to determine the means or method of supplying the heat.

The *Consumers' Coal Co.* court rejected the City's appellate arguments, for reasons which are controlling in this case:

> . . . So we have to inquire whether or not the provisions of the charter prescribed the mode in which the power to furnish heat to the inhabitants of the city shall be exercised; and it seems to us clear that the method is provided for by Section 11, art. 8, of the charter, in the words "construct and otherwise acquire, own and operate gas and electric plants and property for the manufacture and distribution of gas, heat and electricity, for the purpose of supplying the city and the inhabitants thereof with such service and utilities;" and this provision is followed by authority to purchase "appliances, equipment and machinery necessary or incident to the proper operation and maintenance of such public service plants and properties," and a large number of similar provisions all referring to "such public service plants or properties." The central thought conveyed by this language is the establishment of a plant for the distribution of heat in the same manner or by the same method as had been in use for many years in the furnishing of water and light to the inhabitants of the city, namely, by the establishment of a central plant from which the public service was distributed. *The language used contains no hint of any purpose of the people to grant to the city, to be exercised by its legislative body, the authority to enter into fields of private enterprise and into a business which had always theretofore been carried*

on by private individuals to the greater or less satisfaction of the public. To imply such a power from the language used would be to attribute to it a significance away beyond the general acceptation of the import of the terms. *Implied powers, as the words themselves indicate, must find their justification and foundation in express power granted; that is, they are only implied ex necessitate that the express powers may be fully and completely exercised.* The argument being that such powers must have been within the contemplation of the granting authority, as otherwise those expressly granted could not be carried out. No doubt the power is implied to establish a municipal coal and wood-yard for the purpose of supplying the plant for the distribution of heat; but *this power differs essentially from a power to buy fuel and sell it to the inhabitants of the city in the ordinary course of trade.*

. . .

While it is true that the constitutional provision granting all cities the right to form their charters for their own government should be liberally construed in order that the beneficent intention thereof may be fully carried out . . . , *when it comes to a construction of the powers delegated by that charter to the city government, the rule of strict construction still obtains.*

. . .

"The power conferred upon municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and exercise of the power must be confined within the general principles of the law applicable to such subjects."

. . .

> We conclude that the establishment of a municipal fuel yard for the purchase and sale of fuel at retail to the inhabitants of the city of Lincoln is not within the power granted to the city council, and that the ordinance in question is invalid. The case is reversed and remanded to the district court for Lancaster County, with instructions to enter a decree perpetually enjoining the defendants from conducting a fuel business under the said ordinance.

Consumers' Coal Co., 109 Neb. at 73-76, 189 N.W. at 652-653 (emphasis added).

At page 5 of its brief, LES attempts to distinguish the *Consumers' Coal Co.* case, claiming the "general welfare clause" of the City of Lincoln's Charter is "certainly broad enough to include the authority to provide for-hire telecommunications services" because, according to LES, this "general welfare clause" provides Lincoln/LES with "nearly unlimited power." LES does not explain why or how a "general welfare clause" of a city charter could be construed as either expressly or implicitly permitting a division of the City of Lincoln to engage in for-profit retail activities. The Nebraska Supreme Court's decision in the *Consumers' Coal Co.* case is instructive on this point:

> We do not understand it to be claimed that the ordinance in question is referable to the general welfare section of the charter. *To bring it within the police power to which this section refers, some public emergency would have to be shown*, such as a coal famine, or monopoly, whereby the "government might be able to obtain fuel, when citizens generally could not. . . ." No such emergency is suggested.

Consumers' Coal Co., 109 Neb, at 75, 189 N.W. at 652 (emphasis added) (citation omitted).

In accordance with Consumers' Coal Co., LES' reference to the "general welfare section of the charter," as a source of legal authority must be rejected. "To bring [LES Resolution 2000-10] within the police power to which this section refers, some public emergency would have to be shown," and "[n]o such emergency is suggested." *See, Consumers' Coal Co.*, 109 Neb. at 75, 189 N.W. at 652.

LES' attempt to distinguish the *Consumers' Coal Co.* case is based upon the premise that a home rule charter, which is a "limitation" as opposed to a "grant" of power, gives the city "nearly unlimited power." (LES's brief, at p. 5). This is not the law of Nebraska. On the contrary, the Nebraska Supreme Court has held on numerous occasions that a home rule charter confers upon a city a *strictly municipal power* which can readily be overridden by state law. *See, e.g., City of Millard v. City of Omaha*, 185 Neb. 617, 177 N.W.2d 576 (1970) (fact that city has a home rule charter "does not mean that it may not be rendered nugatory by the exercise of state law dealing with other than strictly municipal concerns" and quoting the *Consumers Coal Co.* case for the proposition that the court was and is "thoroughly persuaded that it never was within the contemplation of the framers of our system of government, or of our Constitution, that any city, whether organized under the general laws of this state, or under the provisions of the Constitution which allow cities to frame their own charter, to confer upon cities anything more than a police power, and a strictly municipal power"); *State ex rel. City of Grand Island v. Johnson*, 175 Neb. 498, 122 N.W.2d 240 (1963) ("[w]here the Legislature has enacted a law affecting municipal affairs, but which is of statewide

concern, such law takes precedence over the provisions of a home rule charter"); *Michaelson v. City of Grand Island*, 154 Neb. 654, 48 N.W.2d 769 (1951) ("[w]hen the Legislature has enacted a law affecting municipal affairs, but which [is] also of statewide concern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield"); and *In re Curtailment of Bus Service*, 125 Neb. 825, 252 N.W. 407 (1934) ("upon such subjects as pertain to state affairs as distinguished strictly from municipal affairs, the provisions of the State Constitution and the general laws of the state are as applicable in a home rule municipality as they are elsewhere in the state").

It is clear that LES' desire to engage in for-hire telecommunications services, both within and beyond the territorial limits of the City of Lincoln, gives rise to matters of statewide, rather than strictly municipal, concerns. This conclusion is fully supported by the Nebraska Supreme Court's decision in the *In re Curtailment of Bus Service* case. There, this Commission granted the application of a municipal street railway company to curtail bus service in Omaha. Omaha appealed, claiming that, as a home rule city, Omaha could force the re-institution of those bus services, regardless of what the Commission said. The Nebraska Supreme Court rejected this argument, reasoning:

> Mass transportation of passengers by common carriers within the state is, and ought to be considered, under our existing Constitution and laws, a matter of state concern. It would be anomalous to commit to a regulatory body, created by the Constitution, jurisdiction over intrastate steam railroads carrying passengers for hire everywhere within the state boundaries and

> to deny that jurisdiction over a carrier operating within a home rule charter municipality.

In re Curtailment of Bus Services, 125 Neb. at ___, 252 NW. at 409.

This Commission has been empowered to regulate both intrastate telecommunications and transportation common and contract carriers, respectively. *See, Neb. Rev. Stat.* § 75-604 and *Neb. Rev. Stat.* § 75-309. Application of the *In re Curtailment of Bus Services* Court's reasoning demonstrates that the City of Lincoln's home rule status has no impact on the "legal authority" analysis because the provision of telecommunications services for-hire, either as a common carrier or as a contract carrier, is a matter of statewide concern. *See, Neb. Rev. Stat.* §§ 86-801 *et seq*. The provision of telecommunications services "by common [and contract] carriers within the state is, and ought to be considered, under our existing Constitution. and laws, a matter of state concern." *See, In re Curtailment of Bus Services*, 125 Neb. at ___, 252 NW. at 409. "It would be anomalous to commit to [this] regulatory body, created by the Constitution, jurisdiction over intrastate [telecommunications carriers] for hire everywhere within the state boundaries and to deny that jurisdiction over a carrier operating within a home rule charter municipality." *See, Id.*

While we obviously are not addressing a "jurisdictional" issue in this case, the fact that the provision of telecommunications services for-hire in Nebraska is a "subject[ ] as pertain[s] to state affairs as distinguished from strictly municipal affairs," means that "the general laws of the state are as applicable in a home room municipality," like Lincoln/LES, "as they are elsewhere in the

state." *See, Id.* Thus, because resort must be had to state law to resolve the "legal authority" issue, the strictures of "Dillon's Rule," as construed and applied by the Nebraska Supreme Court in the *Consumers' Coal Co.* case, are fully in play.

The reasoning of the *Consumers' Coal Co.* Court is, therefore, directly applicable to the "LES legal authority" issue in this case. Indeed, the statutory grant of the power to "purchase, construct, and otherwise acquire, own, maintain and operate public service and public utility property," in *Neb. Rev. Stat.* § 15-201(6), is "virtually identical to the grant of "power to purchase, construct, and otherwise acquire, own and operate . . . any and all . . . public service plants and properties, for the purpose of supplying the city and the inhabitants thereof with such service and public utilities," in former Section 11, Article VIII, of the Lincoln Charter, which was at issue in the *Consumers' Coal Co.* case.

Like the charter section in *Consumers, Coal Co.*, in this case, the statutory "language used" in § 15-201(6) "contains no hint of any purpose of the [Legislature] to grant to the city, to be exercised by its legislative body," or by its LES Administrative Board, "the authority to enter into fields of private enterprise and into a business," like for-hire telecommunications, "which ha[s] always theretofore been carried on by private individuals to the greater or less satisfaction of the public." *See, Consumers' Coal Co.*, 109 Neb. at 74, 189 N.W. at 652. Nor is there any basis to imply such a power from the language used in § 15-201(6). Such an implication would "attribute to [§ 15-201(6)'s language] a significance away beyond the general acceptation of the import of the terms." *See, Consumers' Coal Co.*, 109 Neb. at 74, 189 N.W. at 652.

"No doubt the power is implied to establish a municipal" communications system "for the purpose of supplying" telecommunications needed to operate the City's electric system. However, *"this power differs essentially from a power to . . . sell [telecommunications services] to the inhabitants of the city in the ordinary course of trade." See, Id.* (emphasis added). Accordingly, the Commission concludes that LES does not have the legal capacity to provide for-hire contract carrier telecommunications service because the "establishment of a municipal" communications system "for the purchase and sale of [telecommunications] at retail to the inhabitants of the city of Lincoln is not within the power granted to the city council, and that the" LES Resolution 2000-10 "is invalid" as it applies to this application. *See Id.* at 76, 189 N.W. at 653.

LES also claims that it has the ability to engage in "proprietary functions such as providing telecommunications services," based upon a comparison of the power to incorporate a private business under state law "for any lawful purpose." (LES' brief, at p.5). LES' attempt to rely on the general proposition that the "authority given a municipality to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances," *see, United Community Services*, 162 Neb. at 794, 77 N.W.2d at 584, fails on three counts.

First, LES does not explain how operating a private telecommunications business is a proper proprietary function of running a public utility electric system. Second, we disagree with LES' analysis of the *United Community Services* case at pages 20-21 of LES', brief. The important point from the *United Community Services* case is that the

Nebraska Supreme Court specifically rejected a "proprietary function" argument exactly like that made by LES in this case, in the Court's holding which relied upon the principles of "Dillon's Rule." *See, United Community Services*, 162 Neb. at 794-795, 77 N.W.2d at 584 (rejecting OPPD's "proprietary function" contentions, in concluding that OPPD, as a public corporation, could not use revenues to make charitable donations because, "[i]n the absence of express statutory authorization . . . the district was without authority to make these contributions"). Third, LES' "proprietary function" argument is contrary to longstanding Nebraska law which provides that "[g]eneral statutory limitations and restrictions upon the powers of a municipality ordinarily apply to proprietary as well as governmental functions." *Neisus v. Henry*, 142 Neb. 29, 41, 5 N.W.2d 291, 298 (1942) (fact that city, in making illegal payments to chairman of board of public works, as manager of light and water plant, in addition to his statutory salary, was engaged in "proprietary function" did not render inapplicable statutory limits on the power of the city to enter into such a contract).

Finally, we have determined that we need not reach. the question of whether the City of Lincoln/LES possesses the requisite legal authority to perform for-hire contract carrier telecommunications services is a question of statewide commercial importance. We reach this conclusion because, as the NTA has correctly pointed out, the issue of the legal authority of political subdivisions, in general, to enter the intrastate competitive telecommunications field does present a question of statewide commercial importance, and that issue is already a primary subject of the separate investigatory proceeding, opened by this Commission on October 18, 2000, under Application

No. C-2408/PI-42 (the purpose of investigation is to determine what interim policies and requirements should, exist regarding telecommunications contract carriers and applications by political subdivisions with respect to fiber optics).

In conclusion, there is no statute, charter provision or ordinance which either expressly or implicitly grants to LES the power to engage in the for-hire contract carrier telecommunications business. The City of Lincoln's home rule charter grants only *strictly municipal powers* which are strictly construed, and the fact that the provision of telecommunications services for-hire in Nebraska is a subject that pertains to state affairs as distinguished from strictly municipal affairs, means that the provisions of Lincoln's charter must yield to the general laws of the state – general laws which clearly do not grant LES the power to engage in the for-hire contract carrier telecommunications business. Therefore, because LES, as a political subdivision, can exercise no power except such as has been expressly delegated to it, or such as may be inferred from some express delegated power essential to give effect to that power, LES does not have the legal authority to provide for-hire contract carrier telecommunications services.

DECLARATORY RULING AND ORDER

IT IS THEREFORE DECLARED by the Nebraska Public Service Commission that the applicant, the City of Lincoln, d/b/a Lincoln Electric System, is not authorized to offer for-hire telecommunications services or to hold a contract carrier permit to perform such services, because it lacks the required specific legal authority to do so.

FURTHER, IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that, in light of the applicant's lack of legal authority to provide for-hire contract carrier telecommunications services, this matter should be, and hereby is, dismissed.

MADE AND ENTERED at Lincoln, Nebraska this 9th day of January, 2001.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

/s/ Lowell C. Johnson

/s/ Ann C. Boyle

/s/ Rod Johnson

//s// Frank E. Landis

//s// Daniel G. Urwiller

/s/ Frank Landis
Chairman

ATTEST:

/s/ Andy S. Pollock
Executive Director

Concurrence of Commissioner Frank Landis:

The Commission today finds that LES does not have the legal authority to provide for-hire contract carrier telecommunications services. The majority bases their finding on a review of the pertinent statutory provisions and the Lincoln home rule charter. While I concur with the majority's ultimate conclusion that LES lacks the requisite legal authority to provide the intended service, I reach this conclusion following a different path than the one traveled by the majority. For that reason, I write separately.

As a preliminary matter, NTA has asserted that the issue of whether LES possesses the legal authority to provide for-hire telecommunications services is one of "statewide commercial importance. "(NTA "Brief at 1). In

terms of public policy, I agree that whether governmental entities should be in the business of providing telecommunications services is an issue that will have a large impact on all Nebraskans. This Commission has already taken steps to open dialogue on this question (see Application No. C-2408/PI-42), However, characterizing the case before us as one of "statewide commercial importance" loses sight of the specific, and purely legal, question presented by NTA's motion for declaratory ruling – whether the Lincoln Electric System possesses the *legal* authority to provide for-hire telecommunications services. The sources for any such authority are specific to LES: the statute under which Lincoln may exercise power (Neb. Rev. Stat. § 15-201) is only applicable to cities of the primary class, of which Lincoln is the only one; the home rule charter under which Lincoln is organized is one of only two in the state, and is unique to Lincoln; and the ordinances creating LES obviously bind no other entity. Because of the narrow question before us, our findings today will have no precedential effect on any other similar application by a government entity to provide telecommunications service. Furthermore, any conclusions reached as to LES' or another government entity's legal authority to provide telecommunications services is merely the initial hurdle the applicant must clear. If such authority is ever found in any case, the applicant must still demonstrate to this Commission that they meet our standards of financial, managerial, and technical competency, and that their request is in the public interest.

Regardless as to whether Neb. Rev. Stat. § 15-201 grants LES the legal authority to operate as a contract carrier, I would find that the Lincoln home rule charter

grants sufficiently broad powers to encompass the provision of for-hire telecommunications services. The "limitation of power" scheme which the voters of Lincoln amended their charter to in 1992 is one which grants all powers to the city government, limited only by any express reservation of power or by any inconsistency with the Constitution or laws of Nebraska. Article II, Section 1 of the Lincoln Charter expressly grants the city powers of "every name and nature whatsoever," without specifically precluding Lincoln from providing for-hire telecommunications services. No section of Nebraska law or the Constitution expressly prohibits municipalities from providing telecommunications services.

I disagree with the majority's contention that *Consumers' Coal Co. v. City of Lincoln*, 109 Neb. 51 (1922), is controlling in this case. It is a very relevant distinction that the charter interpreted in *Consumers' Coal Co.* was a "grant of power" charter, while the present day Lincoln charter takes a "limitation of power" form. And while the majority may be correct in stating that the powers granted by a home rule charter may be overridden by state law (see supra at 11-12), no state laws prohibit municipalities of the primary class from providing for-hire telecommunications services. In fact, LES recognizes that the state laws empowering this Commission to regulate intrastate telecommunications services take precedence over any exercise of their municipal power by coming to this Commission and subjecting themselves to our jurisdiction.

Despite my conclusion that the Lincoln home rule charter authorizes the city of Lincoln to provide for-hire telecommunications services, a proper analysis of the question presented must proceed to a review of the delegation of that power from the City to LES. LES's powers do

not stem directly from the home rule charter. Instead, LES is a creature brought to life by the City through the City's exercise of its own charter powers. The City may bestow on LES those powers it wishes to bestow through properly enacted ordinances, and may likewise place restrictions on LES' powers. No analysis of LES's powers is thus complete without a review of the ordinances governing LES.

LES is governed by the LES Administrative Board under Chapter 4.24 of the Lincoln Municipal Code. Section 4.24.070(a)-(c) addresses the specific powers and duties of the Administrative Board, granting the board the power to fix salaries for employees, purchase materials for use by LES, and other specific powers. Section 4.24.070(d) expressly prohibits LES from exercising certain powers such as setting rates. Finally, Section 4.24.070(e) grants LES the power to "do and perform all other acts necessary to efficiently maintain and operate the Lincoln Electric System . . . " It is this final subsection which LES contends endows them with the authority to provide for-hire telecommunications services.

Section 4.24.070(e) only allows LES to do those acts "necessary" to operate a municipal electric system. To interpret what powers this subsection authorizes LES to exercise, the language of a city ordinance must be given its plain and ordinary meaning. *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 103 (1996).

The word "necessary" has been given several different meanings by various courts, from those who have given it a more rigid meaning, such as "indispensability" or "absolute requirement", see e.g. *State v. Crowdell*, 234 Neb. 469 (1990), *Atkins v. City of Durham*, 186 S.E. 330 (N.C. 1936), *National Docks & N.J.J.C. RY. CO. v. Pennsylvania R.R.*,

33 A. 860 (N.J. Ch. 1896), to those who have given it a more liberal meaning, such as "convenience" or "usefulness", see e.g. *In Re Application No. A-16642*, 236 Neb. 671 (1990), *Baltis v. Village of Westchester*, 121 N.E.2d 495 (Ill. 1954), *Howton v. Howton*, 124 P.2d 837 (Cal. Dist. Ct. App. 1942). Viewing Section 4.24.070 as a whole leads me to conclude that the word "necessary", as used in Section 4.24.070(e), is to be given a more rigid interpretation.

In the leading treatise on municipal corporation law, one commentator has remarked that "the general rule seems to be that where particular powers expressly conferred are followed by a general grant of power, such general grant by intendment may include all powers that are *fairly within* the term of the grant, and that are *essential* to the purposes of the municipal corporation, and *consistent with* the particular powers." McQuillin, Municipal Corporations (3rd Ed. Rev.) § 10.24. (Emphasis added).

The more general grant of power found in Section 4.24.070(e), following the specific grants and limits of Sections 4.24.070(a)-(d), must therefore be read to include only those powers consistent with the more specific grants and those that are essential to LES' purposes – in other words, Section 4.24.070(e) includes those powers related. to providing electric power to the people of Lincoln. This reading implies that the word "necessary" must be given a more rigid interpretation. To give the word "necessary" in Section 4.24.070(e) a liberal interpretation would be to turn that section into a grant of virtually unlimited power. If such a construction was intended, the need for any specific grants of power, such as those in Sections 4.24.070(a)-(c), would be obviated.

Reading Section 4.24.070(e) to allow LES to perform those acts nearly "indispensable" or "required" to the operation of an electric system leads me to conclude that LES does not have the legal authority to provide for-hire telecommunications services in Nebraska. The relationship between operating an electric system and operating as a contract carrier of telecommunications services is dubious, and LES has made no assertion that continuance of the former is dependent on initiation of the latter.

Finally, it is my view that if the Lincoln City Council formally adopted an ordinance which specifically authorized the LES Administrative Board to apply for certification as a for-hire contract carrier of telecommunications services, the Administrative Board, under the City's "limitation of power" scheme of governance and barring a specific statutory prohibition, would clearly have the legal authority to do so, and this Commission could then proceed to a judgement of the application on the merits.

/s/ Frank Landis
Commissioner Frank E. Landis

SECRETARY'S RECORD, NEBRASKA
PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC
SERVICE COMMISSION

In the Matter of the Application of Lincoln Electric System, Lincoln, seeking contract carrier permit authority.	)))))	Application No. C-2400 MOTIONS DENIED Entered: February 21, 2001

BY THE COMMISSION:

OPINIONS AND FINDINGS

By its application filed October 4, 2000, Lincoln Electric System (LES or Applicant) of Lincoln, Nebraska, seeks contract carrier permit authority. Notice of the application appeared in *The Daily Record*, Omaha, Nebraska on October 5, 2000, pursuant to the rules of the Commission. Formal interventions were filed by a number of parties, all of which were made a party to this proceeding.

On November 9, 2000, intervenor, Nebraska Telecommunications Association (NTA) submitted a Motion for Declaratory Ruling challenging LES' legal authority to provide for-hire telecommunications services in the State of Nebraska. The NTA's motion asked the Commission to declare as a matter of law that the City of Lincoln, d/b/a Lincoln Electric System, is not authorized to offer for-hire telecommunications services or to hold a contract carrier permit to perform such services because it lacks the required legal authority.

A hearing on the NTA motion was held December 11, 2000, in the Commission Hearing Room. Attorneys Jack L. Shultz and Gregory D. Barton appeared on behalf of the NTA. Attorneys Mark J. Ayotte and Douglas L. Curry appeared on behalf of LES. Each party presented their respective arguments on the NTA's Motion for Declaratory Ruling, and the matter was submitted for decision by the Commission at the conclusion of the December 11 oral arguments.

On January 9, 2001, this Commission entered an Order Granting NTA's Motion for Declaratory Ruling. In that order, the Commission determined that there is no statute, charter provision or ordinance that either expressly or implicitly grants to LES the power to engage in the for-hire contract carrier telecommunications business.

Furthermore, the Commission concluded that because LES, as a political subdivision, can exercise no power except such as has been expressly delegated to it, or such as may be inferred from some express delegated power essential to give effect to that power, LES does not have the legal authority to provide for-hire contract carrier telecommunications services.

On January 19, 2001, LES filed a Motion for Rehearing with the Commission requesting that the Commission enter an order granting rehearing in this matter. Soon thereafter, on January 24, 2001, the NTA filed a Motion to Strike Unauthorized Attachments to LES' Motion for Rehearing. As both motions requested oral arguments, an oral argument was held on the motions on January 31, 2001, in the Commission Hearing Room.

After oral arguments and upon review of the briefs filed in this matter, the Commission is of the opinion and

finds that both the Motion to Strike and the Motion for Rehearing should be denied.

The attachments at issue in the Motion to Strike are simply certified copies of the Lincoln Charter, Chapter 4.24 – Lincoln Electric System Administrative Board and LES Resolutions 97-7 and 2000-10. These attachments, while not officially introduced into the record as exhibits, were clearly discussed, at least in part, both in the pleadings filed in this matter and in the oral arguments on the initial Motion for Declaratory Ruling.

The Commission entered the January 9, 2001, order in this matter, based upon all the evidence available to the Commission at that time. To the extent that the attachments mentioned above were not part of the record at that time the decision was rendered, the Commission is of the opinion and finds that they should be accepted into the record at this time.

Nonetheless, the Commission affirms its initial decision in this matter and hereby denies LES' Motion for Rehearing. As discussed above, the Commission has reviewed all of the evidence in this matter and is unpersuaded by LES' Motion for Rehearing. While the Commission has now allowed the record to be supplemented with additional exhibits, the additional evidence has no impact on our decision.

ORDER

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the NTA's Motion to Strike is denied.

IT IS FURTHER ORDERED that LES' Motion for Rehearing is also denied.

MADE AND ENTERED at Lincoln, Nebraska, this 21st day of February, 2001.

NEBRASKA PUBLIC SERVICE COMMISSION

/s/ Frank Landis
Chairman

ATTEST:

/s/ Andy S. Pollock
Executive Director

COMMISSIONERS CONCURRING:

/s/ Lowell C. Johnson

/s/ Anne C. Boyle

//s// Frank E. Landis
//s// Daniel G. Urwiller

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 STATE CAPITOL BUILDING
LINCOLN, NE 68509
(402) 471-3731

September 19, 2001

Gregory D. Barton
HARDING SHULTZ LAW FIRM
121 S. 13th Street, Ste. 800
P.O. Box 82028
Lincoln, NE 68501 2028

IN CASE OF: S-01-000286, In re Application of LES, Lincoln v. Ne Cable Communications Assn.

Mot. of Appellee for Summary Dismissal **filed** 08/31/01

has been reviewed by the court and the following order entered:

Motion of appellee for summary dismissal overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 STATE CAPITOL BUILDING
LINCOLN, NE 68509
(402) 471-3731

February 12, 2003

Jack L. Shultz
HARDING SHULTZ LAW FIRM
121 S. 13th Street, Ste. 800
P.O. Box 82028
Lincoln, NE 68501 2028

IN CASE OF: S-01-000286, In re Application of LES, Lincoln v. Ne Cable Communications Assn.

Appellee/Motion for Rehearing & Brf **filed** 01/21/03

has been reviewed by the court and the following order entered:

Motion of appellee for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

NEBRASKA STATUTES

86-128. Certificate or permit of convenience and necessity.

(1) (b) The commission may only issue a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier after due notice and hearing pursuant to commission rules and regulations. The commission shall not issue a certificate or a permit to an agency or political subdivision of the state.

86-575. Agency or political subdivision; dark fiber; disposition; powers.

(2) No agency or political subdivision of the state shall provide telecommunications services for a fee, except as authorized in sections 79-1319, 81-1120.01 to 81-1120.28, 85-401 to 85-418, and 85-1501 to 85-1542, or be issued a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier. Any agency or political subdivision which sells or leases its dark fiber pursuant to sections 86-574 to 86-578 shall not be deemed to be providing telecommunications services for a fee.

79-1319. Educational telecommunications; operation on noncommercial basis; exceptions; service available to all schools and colleges; costs.

All telecommunications facilities operated or supervised by the Nebraska Educational Telecommunications Commission shall be operated at all times on a noncommercial basis, except that revenue may be generated from

other nonprofit or commercial sources by the lease of excess transponder capacity, excess transmission spectrum, or transmission facilities. All lease arrangements authorized by this section shall be made for the purpose of paying a portion of the costs associated with satellite capacity replacement and digital conversion. All lease arrangements shall be based on sound business principles that are made in the best interest of the State of Nebraska. The commission may also enter into partnerships with public or private entities for the purpose of jointly building and operating tower and other transmission structures.

Operational and administrative service pertinent to the production and utilization of inclass telecommunications instruction shall be made available to all schools and colleges of Nebraska on the basis of the actual cost of production exclusive of general overhead expense.

81-1120.01. Communications system; declaration of legislative purpose.

The Legislature hereby declares that an efficient and reliable communications system is vital to the state during the conduct of regular business of the state and in times of emergency and that substantial economies can be effected by joint use of a consolidated communications system by departments, agencies, and subdivisions of state government. It is, therefor, declared to be the purpose of sections 23-1715, 81-1108.02, 81-1120.01 to 81-1120.03, 81-1120.15 to 81-1120.28, and 81-1423 and the policy of the state to provide for the continual development of an efficient and reliable communications system for joint use by departments, agencies, and subdivisions of state government, to

effect maximum practical consolidation and joint use of existing communications facilities and services owned or used by the state, and generally to coordinate all communications functions and activities of state government.

81-1120.02. Terms, defined.

As used in sections 81-1120.01 to 81-1120.03 and 81-1120.15 to 81-1120.28, unless the context otherwise requires:

(1) Director shall mean the Director of Communications;

(2) Division shall mean the division of communications of the Department of Administrative Services;

(3) Communications system shall mean the total communications facilities and equipment owned, leased, or used by all departments, agencies, and subdivisions of state government; and

(4) Communications shall mean any transmission, emission, or reception of signs, signals, writing, images, and sounds or intelligence of any nature by wire, radio, optical, or other electromagnetic systems.

81-1120.03. Department of Administrative Services; division of communications; creation; Director of Communications; appointment; qualifications.

There is hereby created, within the Department of Administrative Services, a division of communications to be headed by the Director of Communications. The Director of Administrative Services shall appoint as Director of

Communications any person who has not less than six years' experience in a position or positions which include responsibility for management, purchase, lease, or control of communications for a private or governmental enterprise. No person shall hold the position of director who is directly or indirectly interested in any communications common carrier or other company engaged in the furnishing of communications services or facilities, but investment in stock of a communications common carrier in an amount determined by the Director of Administrative Services to be not significant shall not be considered disqualifying.

81-1124.04 to 81-1120.07. Transferred to sections 81-1120.17 to 81-1120.20.

81-1120.08 to 81-1120.14. Transferred to sections 81-1120.22 to 81-1120.28.

81-1120.15. Director of Communications; powers, duties, and responsibilities.

The Director of Communications shall have the following powers, duties, and responsibilities:

(1) To provide the Legislature and the Governor technical assistance, advice, and information concerning the financial and administrative operations of the communications systems of all agencies of the state;

(2) To provide the Legislature and the Governor recommendations for dealing with financial, management, and organizational problems affecting the communications

systems and services of the state, its departments and agencies;

(3) To make inquiries of the agencies as to their communications charges and prepare cost comparisons to insure that uniformity, efficiency, and equality be achieved within the communications system;

(4) To make recommendations to the agencies pertaining to revisions to internal systems as may be necessary to promote frugality and economy in the communications system; and

(5) To provide services such as system review, system design, feasibility studies, equipment reviews, and for long-range planning and management service within the division of communications.

81-1120.16. Director of Communications; powers and duties; investigation; report.

It shall be the duty of the director to consult each department, office, board, bureau, commission, or institution in the state for which money is to be appropriated and expended for communications services, equipment or facilities, including the executive and judicial departments, state colleges, university and state institutions. The director shall make or cause to be made under his supervision an investigation to determine whether the appropriations are being judiciously and economically expended for the purposes for which they were made, and shall transmit to the Governor, the Legislative Fiscal Analyst, and to the expending agency a complete report of each such investigation. In making such investigations he shall, at all reasonable times, have access to the offices of

all state departments, boards, bureaus, commissions, and institutions, and may, for the purpose of obtaining information as to the operation and communications needs thereof, examine the books, papers and public records therein, and the agencies shall, through their proper officers, furnish such data, information, or statements as may be requested of them.

81-1120.17. Division of communications; powers and duties.

The division of communications shall have the following duties, powers, and responsibilities:

(1) To coordinate the purchase, lease, and use of communications services equipment and facilities for state government;

(2) To advise departments and agencies of the state and political subdivisions thereof as to systems or methods to be used to meet requirements efficiently and effectively;

(3) To provide assistance as requested by the Nebraska Information Technology Commission to support the technical panel created in section 86-521;

(4) To consolidate and integrate radio communications systems and services of state agencies so far as practical and to provide for their joint use by the agencies;

(5) To consolidate telephone and telephone-related activities, so far as practical, and to provide for their joint use by the agencies;

(6) To assume management responsibility for any consolidated system or service and approve all purchases and contracts for such communications activities;

(7) To enter into agreements for the mutual support and use of communications services of the agencies and departments of state government and its political subdivisions;

(8) To provide for the rendering of mutual aid between state government and its political subdivisions and to cooperate with other states and the federal government with respect to the organizing of communications in expediting the carrying out of mutual aid in disasters, emergencies, and civil defense emergencies under the Emergency Management Act;

(9) To use or acquire communications facilities now owned or operated by any state agency and to compensate such agency when appropriate;

(10) To standardize policies and procedures for the use of such services in such a manner that communications systems in the domain of public safety or security not be compromised;

(11) To assume responsibility for the maintenance and repair of state-owned communications facilities so far as practical;

(12) To coordinate and consolidate maintenance and repair procedures and facilities so far as possible in the light of good business practice and the requirements of the agencies and departments concerned;

(13) Subject to the conditions provided in section 81-1120.19, to contract with qualified suppliers and communications common carriers for communications facilities or services, including private-line services;

(14) To apply for, receive, coordinate, and hold or, if appropriate, assist agencies in applying for, receiving, or holding such authorizations, licenses, and allocations of channels and frequencies as are necessary to carry out the purposes of sections 81-1120.01 to 81-1120.03 and 81-1120.15 to 81-1120.28;

(15) To acquire real estate, equipment, and other property as an agency of the state, subject to the provisions of section 81-1120.19;

(16) To cooperate with the Nebraska Emergency Management Agency as to its needs for emergency communications services; and

(17) To insure that communications facilities are not used for any purpose which is contrary to the policy and intent of sections 81-1120.01 to 81-1120.03 and 81-1120.15 to 81-1120.28 or contrary to the laws and agreements under which the facilities are to be utilized.

81-1120.18. Division of communications; form advisory boards; expenses.

The division of communications may form temporary advisory boards to provide advice in the development, management, administration, and operation of a consolidated communications system to meet the communications requirements of all departments and agencies of state government. Board members shall be selected by the

division and shall receive no compensation for duties performed as members of a board, but shall be reimbursed for actual expenses incurred while engaged in the performance of their duties under the provisions of sections 23-1715, 81-1108.02, 81-1120.01 to 81-1120.03, 81-1120.15 to 81-1120.28, and 81-1423 as provided in sections 81-1174 to 81-1177 for state employees.

81-1120.19. Division of communications; powers; limitation.

The division shall have authority to purchase or lease communications facilities, services, or channels on terms which are for the best interests of the State of Nebraska. In making the decision as to what proposal is for the best interests of the state, the decision of the division shall be based upon, but not necessarily limited to, (1) the total cost to the state, computed in accordance with accepted governmental cost-accounting procedures taking into account taxes to be paid or foregone, interest rates, and obsolescence; (2) the quality of the service offered; (3) the comprehensiveness of the proposed facilities or plan; (4) the financial responsibility of the supplier or carrier submitting the proposal; (5) the repair and maintenance capabilities of the supplier or carrier; (6) the experience as a communications carrier or supplier, as applicable; and (7) the alternate methods or facilities available. The powers conferred by this section shall be subject to the condition that, except for existing state-owned facilities, the division shall obtain all exchange, intercity, toll, wide-area and private-line communications service from telecommunications carriers that are certificated or permitted by the Public Service Commission for any area in which such services are rendered. Any purchase or lease, except

from such telecommunications carriers, made by the division shall be made through the materiel division of the Department of Administrative Services pursuant to the functions, powers, and duties of such division.

81-1120.20. Joint use of communications; departments; agencies; cooperation.

Personnel of all departments, offices, and agencies of state government shall cooperate and assist to the maximum extent possible in the consolidation, redistribution, and joint use of communications systems and services used by and under the direction of such departments or agencies and shall coordinate all communications services or facilities procurement through the Director of Communications.

81-1120.21. Repealed. Laws 1994, LB 948, s. 1.

81-1120.22. Director of Communications; develop system of billings and charges; payment; Communications Cash Fund; deposit; investment; Telephone Expense Revolving Fund; created; purpose.

The Director of Communications shall develop a system of equitable billings and charges for communications services provided in any consolidated or joint-use system of communications. Such system of charges shall reflect, as nearly as may be practical, the actual share of costs incurred on behalf of or for services to each department, agency, or political subdivision provided services from the communications system. Using agencies shall pay for such services out of appropriated or available funds. All

payments shall be credited to the Communications Cash Fund. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act. All collections for payment of telephone expenses shall be credited to the Telephone Expense Revolving Fund which is hereby created. Expenditures shall be made from the Telephone Expense Revolving Fund for the payment of telephone expenses subject to appropriations by the Legislature. Such payment shall be made by the Director of Communications.

81-1120.23. Communications Cash Fund; established; purpose; investment.

There is hereby established a cash fund to be known as the Communications Cash Fund. Appropriations made to the Department of Administrative Services for the purposes of sections 81-1120.01 to 81-1120.28 shall be credited to the fund. All funds received under such sections and all funds received for communications services provided to any agency, department, or other user shall be credited to the fund. The division shall, under policies and procedures established by the director, expend funds from time to time credited to the fund for the communications purposes enumerated in such sections. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

81-1120.24. Nebraska educational television network; exempt from sections; when.

Sections 23-1715, 81-1108.02, 81-1120.01 to 81-1120.03, 81-1120.15 to 81-1120.28, and 81-1423 shall not apply to the Nebraska educational television network except for such services or assistance as may be mutually beneficial and agreed upon by and between the division of communications and the Nebraska Educational Television Commission. Under conditions of emergency declared by the Governor, the communications resources of the Nebraska educational television network shall be coordinated with the communications system, as directed by the Governor, so as to provide full use of available services in the rendering of public assistance and providing aid and protection to life and property.

81-1120.25. Emergency; Governor; direct assumption of control.

In the event of an emergency, the Governor may direct the assumption of control over all or part of the communications system pursuant to the Emergency Management Act.

81-1120.26 Director of Communications; state or political subdivision; gifts, property; accept; purpose; procedure.

The Director of Communications is hereby authorized to receive gifts, contributions, property and equipment from public or private sources to be utilized in providing communications services, and to participate with the federal government in carrying out programs for communications

services within the State of Nebraska. Whenever the federal government or any agency or officer thereof shall offer to the state, or through the state to any political subdivision thereof, communications services, equipment, supplies, materials, or funds by way of gift, grant, or loan for purposes of communications system objectives, the state, acting through the Governor, or such political subdivision, acting with the consent of the Governor and through its executive officer or governing body, may accept such offer and upon such acceptance the Governor or executive officer or governing body of such political subdivision may authorize any officer of the state or such political subdivision to receive such services, equipment, supplies, materials, or funds on behalf of the state or such political subdivision, and subject to the terms of the offer and rules and regulations, if any, of the agency making the offer.

81-1120.27. Telecommunications system; uses; member of Legislature; long-distance calls; how made.

(1) The facilities of the state's telecommunications systems are provided for the conduct of state business. In addition, the state's telecommunications systems may be used by state employees and officials for local calls and long-distance calls to children at home, teachers, doctors, day care centers, and baby-sitters, to family members to inform them of unexpected schedule changes, and for other essential personal business. The use of the state's telecommunications systems for essential personal business shall be kept to a minimum and shall not interfere with the conduct of state business. Essential personal long-distance calls shall be either collect, charged to a third-party, nonstate number, or charged to a personal credit card.

(2) A member of the Legislature, while engaged in legislative business, may make personal long-distance calls on the state telecommunications system or by using his or her state credit card. At the end of every month upon the member's receipt of his or her long-distance call record, the personal long-distance calls shall be designated by the member and the member billed for such calls. Reimbursement to the state for such personal long-distance calls by the member shall be made within thirty days from the date of designation.

(3) A member of the Legislature, at his or her own sole discretion, may designate any long-distance call as sensitive or confidential in nature. If a long-distance call is designated as sensitive or confidential in nature, any long-distance call record used in an audit shall contain only the date the long-distance call was made and the cost of the call. In no case shall the person conducting the audit have access to a long-distance call number designated as sensitive or confidential in nature by the member without the written consent of the member. No calls made to or by a member of the Legislature which are sensitive or confidential in nature shall be required to be disclosed except that such calls shall be so designated by the member, and only the amount of the call and such designation shall be made available to a person conducting an audit.

For purposes of this subsection, sensitive or confidential in nature shall mean that either the member of the Legislature or the caller would reasonably expect that the nature or the content of the call would not be disclosed to another person without the consent of the member and the caller.

81-1120.28. Communications system; not to function as news agency; information; privileged; exceptions.

The communications system and the director shall not function as a public information or news agency. Communications transmitted on or through the communications system shall be the privileged information of the sender and receiver; PROVIDED, that this shall not prohibit the sender or receiver from releasing to others or to the public such information; AND PROVIDED FURTHER, that in the event of an emergency, the Governor shall have the power to direct release of such information as he deems in the best interests of the state.

85-401. Board of Regents; Board of Trustees; campus buildings and facilities; lease purchase agreements authorized; conditions.

Subject to subsection (10) of section 85-1414, the Board of Regents of the University of Nebraska and the Board of Trustees of the Nebraska State Colleges are authorized to lease to any person, firm, or corporation such portions of the campus of the respective institutions under their control as may be necessary to be used as sites for the construction of fireproof buildings for dormitories and for boarding, housing, and student activity purposes, for athletic structures, and for parking or as sites for the establishment of parking facilities, and they may acquire lands adjacent to the campus of any such institution by donation or purchase with any funds they may have available for that purpose to be leased as sites for such buildings and facilities. Subject to subsection (10) of section 85-1414, the Board of Regents of the University of Nebraska and the Board of Trustees of the Nebraska State

Colleges may also lease from any person, firm, or corporation an athletic structure or structures constructed on a site or sites owned by the State of Nebraska when the person, firm, or corporation has the permission of the Legislature to construct on such site or sites.

The State of Nebraska shall incur no liability by reason of the exercise of the authority granted in this section to the Board of Regents of the University of Nebraska and the Board of Trustees of the Nebraska State Colleges other than is hereinafter specifically set forth. The buildings and facilities so erected or established shall be used solely, for dormitories and for boarding, housing, and student activity purposes, for athletic structures, and for parking, as the case may be.

Subject to subsection (10) of section 85-1414, the Board of Regents of the University of Nebraska and the Board of Trustees of the Nebraska State Colleges are hereby authorized to contract with the owners of the buildings and facilities so erected or established on the leased grounds or state sites to pay as rental or otherwise for the use of the buildings and facilities a sum sufficient to pay, on the amortization plan, the principal and interest thereon of the cost of construction or establishment of the buildings and facilities, such contracts to run not over forty years.

The rate of interest allowed on the cost of construction or establishment shall be fixed by the Board of Regents of the University of Nebraska or Board of Trustees of the Nebraska State Colleges, payable annually or semiannually as may be determined by the Board of Regents of the University of Nebraska or the Board of Trustees of the Nebraska State Colleges. The contract shall provide that

when the cost of construction or establishment has been paid, together with interest thereon, the buildings and facilities so constructed or established shall become the property of the State of Nebraska.

85-402. Campus buildings and facilities; pledge of income and appropriations authorized; limitations.

The Board of Regents of the University of Nebraska and the Board of Trustees of the Nebraska State Colleges are hereby authorized:

(1) To expend on the amortization plan any part of the rentals on any and all rooms, dormitories, dining rooms, and housing or student activity facility buildings or parking buildings or facilities constructed or established pursuant to section 85-401 and any part of the revenue of any athletic structure so constructed or established;

(2) In the case of the construction of buildings for dormitories and for boarding and housing purposes, to expend any part of the net rentals received from other buildings, theretofore constructed on the same campus for dormitories and for boarding and housing purposes, connected with the respective institutions under their control;

(3) In the case of the construction or establishment of buildings or facilities for parking, to expend any part of the net revenue received from other parking buildings and facilities, including parking registration fees, theretofore constructed or established on the same campus, connected with respective institutions under their control, in the payment of the construction or establishment charges and interest thereon; and

(4) To pledge on behalf of the respective institutions the net income from the rentals for the payment of such construction or establishment charges and interest.

In no case shall the contracts run for a longer period than forty years, and in no case is the Board of Regents of the University of Nebraska or the Board of Trustees of the Nebraska State Colleges authorized to pledge the credit of the State of Nebraska for the payment of any sum or sums over and above the net income derived from the use of the building or buildings or facility or facilities, except that there may be pledged for the payment of such contracts any appropriations specifically made for such purposes by the Legislature.

85-403. Campus buildings and facilities; construction, purchase, or repair; revenue bonds; authorized; not obligation of state or governing board; investment of proceeds.

Supplemental to any existing law on the subject, the Board of Regents of the University of Nebraska and the Board of Trustees of the Nebraska State Colleges, respectively, may construct, purchase, or otherwise acquire, remodel, repair, furnish, and equip dormitories, residence halls, single-dwelling or multiple-dwelling units, or other facilities for the housing and boarding of students, single or married, faculties, or other employees of the institutions under their control, buildings and structures for athletic purposes, for student and faculty unions or centers, and for the medical core and physical development and other activities of the students of the institutions, and buildings or other facilities for parking on real estate then owned or

controlled by either of such boards or on real estate purchased, leased, or otherwise acquired for such purposes and pay the cost thereof, including such real estate, by issuing revenue bonds payable solely out of their revenue other than funds derived from taxation, except that any building or facility for parking shall be located on or adjacent to campuses controlled by such boards.

Bonds issued under the provisions of sections 85-403 to 85-411 are not an obligation of the State of Nebraska, and no tax shall ever be levied to raise funds for the payment thereof or interest thereon. The bonds shall not constitute a debt of the board issuing the same and shall be paid solely out of money derived from their revenue and earnings as provided in sections 85-403 to 85-411. If any proceeds from such bonds are available for investment, such investment shall be by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

85-403.01. Legislative findings.

The Legislature hereby finds and determines: It has been the experience of both the Board of Regents of the University of Nebraska and the Board of Trustees of the Nebraska State Colleges that the lack of facilities of the types authorized by section 85-403, to be constructed, purchased, or otherwise acquired, remodeled, repaired, furnished and equipped by such boards, has deterred many individuals from attending the institutions under the control of the boards or added increased burdens upon many individuals in attending such institutions. With the continuation of the trend of more high school graduates enrolling and remaining in the institutions under the

control of the boards and the normal population growth of the state, the lack of such facilities may continue to deter many individuals from attending such institutions or may add additional burdens upon those who do attend. The powers granted to both boards under sections 85-401 to 85-411, and the exercise by the boards of such powers, are for educational purposes, being not only directly related to the carrying out by the boards of their functions in supplying higher education but in fact necessary to the carrying out of such functions to the greatest possible benefit of the people of the state. In connection with certain grants or contributions to the Board of Regents of the University of Nebraska, that board heretofore has been created a public corporation for educational purposes. It is necessary, advisable and desirable that its status as a public corporation organized for educational purposes specifically include the exercise by it of the powers granted to it under sections 85-401 to 85-411 and that the Board of Trustees of the Nebraska State Colleges also be created a public corporation organized for educational purposes for the exercise of the powers granted to it under such sections.

85-403.02. Repealed. Laws 1988, LB 802, s. 41.

85-404. Dormitories; housing facilities; parking facilities; other facilities; revenue bonds; issuance; review by Coordinating Commission for Postsecondary Education; approval by Legislature.

Either of the boards referred to in section 85-403 is hereby specifically authorized and empowered, by resolution or agreement, to pledge all or any part of the revenue and fees derived from the operation of the dormitories,

residence halls, single-dwelling or multiple-dwelling units, buildings, and facilities for parking and other facilities for housing, boarding, athletic purposes, medical care, and physical development and other activities of students, faculties, or employees of such institutions referred to in section 85-403, or any of them, erected or acquired, or previously erected or acquired by such board, and contract as to the care, insurance, management, and operation of such buildings and facilities and the charges to be made and the rights of the holders of the revenue bonds. When the board contracts that the operation of any building or facility or part thereof shall be performed other than by the board itself, the board shall at all times maintain supervision thereof and control over the fees and charges imposed for the use thereof.

When such board proposes to pledge all or any part of the revenue and fees from buildings and facilities other than the building or facility to be constructed, the plans for such building or facility to be constructed, including financing plans, shall first be reviewed by the Coordinating Commission for Postsecondary Education as provided in section 85-1415 and approved or disapproved by the Legislature or, if the Legislature is not in session, the Executive Board of the Legislative Council as provided in such section.

85-405. Campus buildings and facilities; revenue bonds; registration; place of payment.

All revenue bonds issued under the provisions of sections 85-403 to 85-411, shall be registered in the office of the Director of Administrative Services of the State of Nebraska. The revenue bonds may be payable at the office

of the State Treasurer of Nebraska or such bank or trust company, either within or without the State of Nebraska, or such other place as may be determined by the board.

85-406. Campus buildings and facilities; revenue bonds; proceeds; use.

The proceeds of bonds provided for in sections 85-403 to 85-411, shall be used solely for the purpose for which they are issued and the expense of issuance of the revenue bonds in connection therewith.

85-407. Campus buildings and facilities; refunding bonds; authorized.

For the purpose of refunding any revenue bonds which may have been issued under the provisions of sections 85-403 to 85-411 and then outstanding, or for the purpose of refunding any indebtedness on the parking buildings and facilities of such institutions or on dormitories or other facilities for the housing, boarding, and activities of students, faculties, and employees of the institutions under the control of the boards issued under the provisions of Chapter 85, article 4, the boards are authorized to issue revenue refunding bonds in the same manner as herein provided for the issuance of revenue bonds.

85-408. Dormitories; housing facilities; other facilities; rates, fees, or charges; pledge for payment of bonds; surplus; review by Coordinating Commission for Postsecondary Education; approval by Legislature.

The boards are authorized and directed to establish and maintain such schedule of rates, fees, or charges for the use of the facilities afforded by the buildings constructed or acquired under sections 85-401 to 85-411 and other facilities controlled by such board, the revenue of which in whole or in part is pledged to the holder of the bonds, which shall be in an amount at least sufficient on the amortization plan to pay the operating and maintenance charges thereof and the principal and interest representing the indebtedness against the income and revenue therefrom and may be sufficient in amount to provide for such bond reserve, replacement, and surplus funds as the boards in their discretion shall determine. The amounts in such funds shall be expended for such purposes in connection with the facilities as the boards shall determine, and any amount in any surplus or replacement fund and any amounts received through the sale, condemnation, or destruction of any facilities may be used to construct, repair, or replace any of the types of facilities described in section 85-403. Any amounts in such funds are specifically appropriated to the purposes of such funds and shall at all times be subject to the orders of the boards accordingly.

Before any single expenditure in excess of two hundred fifty thousand dollars is made from any such surplus or replacement fund, the board concerned shall first submit such proposed expenditure to the Coordinating Commission for Postsecondary Education for review as

provided in section 85-1415 and secure the approval of the Legislature or, if the Legislature is not in session, of the Executive Board of the Legislative Council as provided in such section.

85-409. Campus buildings and facilities; utilities; board furnish.

The respective boards, referred to in section 85-403, in their discretion may furnish heat, light, power, and other similar utilities to any building or structure, or for any activities covered by the provisions of sections 85-403 to 85-411, without charging the same against the revenue derived therefrom.

85-410. Campus buildings and facilities; revenue bond, issuance; public purpose; exempt from taxation.

In exercising the powers granted it under sections 85-401 to 85-411, and in issuing revenue bonds as provided in sections 85-403 to 85-411, the board exercising such powers or issuing the bonds shall constitute and be and is hereby created as a public corporation organized for educational purposes and is declared to be a governmental subdivision and instrumentality of the State of Nebraska, and all bonds issued under the authority of sections 85-403 to 85-411, together with interest thereon, shall be wholly exempt from taxation.

85-411. Campus buildings and facilities; board; powers.

The boards are hereby authorized and empowered to do any and all things necessary and convenient to carry out the purposes and intent of sections 85-403 to 85-411.

85-412. Deferred maintenance; legislative findings; sections; how construed.

(1) The Legislature finds and determines that protecting investments in buildings through the completion of deferred maintenance, repair, renovation, and facility replacement construction projects is of critical importance to the State of Nebraska. The Legislature further recognizes that arresting the continued deterioration of buildings, limiting the effects of inflation on the costs of such deferred maintenance, repair, renovation, and facility replacement construction, and bringing such buildings into compliance with current health and safety requirements at the earliest possible time is necessary for protecting such investment in the buildings of the State of Nebraska. In order to accomplish these goals, it is necessary, desirable, and advisable that the Legislature provide for the receipt of funds for such purposes as soon as practicable with the repayment of such funds to be made over a period of years. The Legislature recognizes the commitment of (a) the Board of Regents of the University of Nebraska to provide matching funds on a one-to-one basis up to five million five hundred thousand dollars per year for a total of up to fifty-five million dollars and (b) the Board of Trustees of the Nebraska State Colleges to provide matching funds on a one-to-one basis up to four

hundred thousand dollars per year for a total of four million dollars.

(2) Sections 85-412 to 85-418 do not modify, reduce, or eliminate any provision of subsection (10) of section 85-1414 requiring the approval of the Coordinating Commission for Postsecondary Education for any deferred maintenance, repair, renovation, or facility replacement construction project authorized by sections 85-414 and 85-417 and undertaken by the Board of Regents of the University of Nebraska or the Board of Trustees of the Nebraska State Colleges.

85-413. University of Nebraska Facilities Program; created; use.

The University of Nebraska Facilities Program is created. All funds appropriated to the program by the Legislature shall be used exclusively for deferred maintenance, repair, renovation, and facility replacement construction projects authorized pursuant to section 85-414.

85-414. University of Nebraska Facilities Program; funding; intent; Board of Regents of the University of Nebraska; powers and duties.

(1) Beginning with the fiscal year commencing July 1, 1999, and continuing through the fiscal year ending June 30, 2009, the Legislature shall appropriate each fiscal year from the General Fund an amount not less than five million five hundred thousand dollars to the University of Nebraska Facilities Program to be used by the Board of Regents of the University of Nebraska to accomplish projects as provided in this section. Through the

allotment process established in section 81-1113, the Department of Administrative Services shall make appropriated funds available. Undisbursed appropriations balances existing in the University of Nebraska Facilities Program at the end of each fiscal year until June 30, 2012, shall be and are hereby reappropriated.

(2) The Legislature finds and determines that the projects funded through the University of Nebraska Facilities Program are of critical importance to the State of Nebraska. It is the intent of the Legislature that the appropriations to the program shall not be reduced until all contracts and securities relating to the construction and financing of the projects or portions of the projects funded from such funds or accounts of such funds are completed or paid but in no case shall such appropriations extend beyond the fiscal year ending June 30, 2009, nor shall the cumulative total of the General Fund appropriations for the program exceed fifty-five million dollars.

(3) Subject to the receipt of project approval from the Coordinating Commission for Postsecondary Education as required by subsection (10) of section 85-1414 for each of the following University of Nebraska projects, the Board of Regents of the University of Nebraska is authorized to make expenditures from the University of Nebraska Facilities Program for the following projects: (a) Deferred maintenance, repair, and renovation of University of Nebraska at Kearney Bruner Hall; (b) deferred maintenance, repair, and renovation of University of Nebraska at Kearney Otto Olson Vocational Arts Building; (c) deferred maintenance, repair, and renovation of University of Nebraska-Lincoln Love Library; (d) deferred maintenance, repair, and renovation of University of Nebraska-Lincoln Snyder Building at the West Central Research Extension

Center; (e) construction of a facility to replace University of Nebraska-Lincoln Lyman Hall and Bancroft Hall; (f) construction of a facility to replace University of Nebraska-Lincoln Biochemistry Building; (g) deferred maintenance, repair, and renovation of University of Nebraska-Lincoln Hamilton Hall; (h) deferred maintenance, repair, and renovation of University of Nebraska-Lincoln Avery Hall; (i) deferred maintenance, repair, and renovation of University of Nebraska Medical Center Poynter Hall; (j) deferred maintenance, repair, and renovation of University of Nebraska Medical Center Swanson Hall, Bennet Hall, and Service Building; (k) deferred maintenance, repair, and renovation of University of Nebraska Medical Center Library housed in Wittson Hall; (l) deferred maintenance, repair, and renovation of University of Nebraska at Omaha Allwine Hall; and (m) deferred maintenance, repair, and renovation of University of Nebraska at Omaha Arts and Sciences Hall.

(4) Expenditures of matching funds provided for the projects listed in this section by the Board of Regents of the University of Nebraska as provided for in section 85-412 shall be accounted for in the Nebraska State Accounting System through the University of Nebraska Facilities Program or according to some other reporting process mutually agreed upon by the University of Nebraska and the Department of Administrative Services.

(5) The Board of Regents of the University of Nebraska shall record and report, on the Nebraska State Accounting System, expenditure of amounts from the University of Nebraska Facilities Program and expenditure of proceeds arising from any contract entered into pursuant to this section and section 85-415 in such manner and format as prescribed by the Department of Administrative

Services or according to some other reporting process mutually agreed upon by the University of Nebraska and the Department of Administrative Services.

(6) The Board of Regents of the University of Nebraska shall provide to the Task Force for Building Renewal semiannual reports concerning the status of each project authorized by this section.

85-415. University of Nebraska Facilities Program; contracts authorized; limitations.

(1) In order to accomplish any projects authorized by section 85-414, the Board of Regents of the University of Nebraska may enter into contracts with any person, firm, or corporation providing for the implementation of any such project of the University of Nebraska and providing for the long-term payment of the cost of such project from the University of Nebraska Facilities Program. In no case shall any such contract extend for a period beyond July 15, 2011, nor shall any such contact exceed the repayment capabilities implicit in the funding streams authorized in sections 85-412 and 85-414.

(2) The Board of Regents of the University of Nebraska shall not pledge the credit of the State of Nebraska for the payment of any sum owing on account of such contract, except that there may be pledged for the payment of any such contract any appropriation specifically made by the Legislature for such purpose, together with such funds of the Board of Regents of the University of Nebraska as the board determines. No contract shall be entered into pursuant to this section without prior approval by resolution by the Board of Regents. The Board of Regents may also convey, lease, or lease back all or any

part of the projects authorized by section 85-414 and the land on which such projects are situated to such person, firm, or corporation as the Board of Regents may contract with pursuant to this section to facilitate the long-term payment of the cost of such projects. Any such conveyance or lease shall provide that when the cost of such projects has been paid, together with interest and other costs thereon, such projects and the land on which such projects are located shall become the property of the Board of Regents.

(3) The Board of Regents of the University of Nebraska is authorized to make expenditures for the purposes stated in this section and section 85-414 from investment income balances in any fund created under the authority provided for in any contractor contracts authorized by this section. Any appropriated amounts and amounts designated or matched by the Board of Regents under section 85-412 in excess of amounts required to meet debt service and any interest earnings derived from reserve funds or any other funds created under the authority provided for in any contract or contracts authorized by this section shall be accumulated and applied toward early retirement of debt as authorized under any indenture or other contract entered into by the Board of Regents as authorized by this section. The Board of Regents and the Department of Administrative Services shall, on or before January 1, 1999, enter into an agreement providing for the allocation and distribution of any balances existing in the University of Nebraska Facilities Program or any other funds created as part of a long-term contract entered into by the Board of Regents pursuant to this section to the General Fund and any other funds designated by the Board of Regents as a source of funds for the match

specified in section 85-412 either on July 15, 2011, or when all financial obligations incurred in the contracts entered into by the Board of Regents pursuant to this section are discharged, whichever occurs first.

85-416. State College Facilities Program; created; use.

The State College Facilities Program is created. All funds appropriated to the program by the Legislature shall be used exclusively for deferred maintenance, repair, and renovation projects authorized pursuant to section 85-417.

85-417. State College Facilities Program; funding; intent; Board of Trustees of the Nebraska State Colleges; powers and duties.

(1) Beginning with the fiscal year commencing July 1, 1999, and continuing through the fiscal year ending June 30, 2009, the Legislature shall appropriate each fiscal year from the General Fund an amount not less than four hundred thousand dollars to the State College Facilities Program to be used by the Board of Trustees of the Nebraska State Colleges to accomplish projects as provided in this section. Through the allotment process established in section 81-1113, at a minimum, the Department of Administrative Services shall make appropriated funds available. Undisbursed appropriations balances existing in the State College Facilities Program at the end of each fiscal year until June 30, 2012, shall be and are hereby reappropriated.

(2) The Legislature finds and determines that the projects funded through the program are of critical importance to the State of Nebraska. It is the intent of the Legislature that the appropriations to the program shall not be reduced until all contracts and securities relating to the construction and financing of the projects or portions of the projects funded from such funds or accounts of such funds are completed or paid but in no case shall such appropriations extend beyond the fiscal year ending June 30, 2009, nor shall the cumulative total of the General Fund appropriations for the program exceed four million dollars.

(3) Subject to the receipt of project approval from the Coordinating Commission for Postsecondary Education as required by subsection (10) of section 85-1414 for each of the following state college projects, the Board of Trustees of the Nebraska State Colleges is authorized to make expenditures from the State College Facilities Program for the following state college projects: (a) Deferred maintenance, repair, and renovation of Chadron State College Administration Building; (b) deferred maintenance, repair, and renovation of Chadron State College Memorial Hall; (c) deferred maintenance, repair, and renovation of Chadron State College Math and Science Building; (d) deferred maintenance, repair, and renovation of Chadron State College Old Library; (e) deferred maintenance, repair, and renovation of Chadron State College Reta King Library; (f) deferred maintenance, repair, and renovation of Peru State College Library; (g) deferred maintenance, repair, and renovation of Peru State College Hoyt Science Hall; (h) deferred maintenance, repair, and renovation of Peru State College Old Gymnasium; (I) deferred maintenance, repair, and renovation of Peru State College Power

Plant; (j) deferred maintenance, repair, and renovation of Wayne State College Broadcast Studio; (k) deferred maintenance, repair, and renovation of Wayne State College Hahn Administration Building; (l) deferred maintenance, repair, and renovation of Wayne State College Memorial Stadium; (m) deferred maintenance, repair, and renovation of Wayne State College Ramsey Theater; (n) deferred maintenance, repair, and renovation of Wayne State College Rice Auditorium; (o) deferred maintenance, repair, and renovation of Wayne State College Telecommunications Classrooms; and (p) system wide miscellaneous fire and life safety, energy conservation, deferred repair, federal Americans with Disabilities Act of 1990, and asbestos removal projects.

(4) Expenditures of matching funds provided for the projects listed in this section by the Board of Trustees of the Nebraska State Colleges as provided for in section 85-412 shall be accounted for in the Nebraska State Accounting System through the State College Facilities Program or according to some other reporting process mutually agreed upon by the state colleges and the Department of Administrative Services.

(5) The Board of Trustees of the Nebraska State Colleges shall record and report, on the Nebraska State Accounting System, expenditure of amounts from the State College Facilities Program and expenditure of proceeds arising from any contract entered into pursuant to this section and section 85-418 in such manner and format as prescribed by the Department of Administrative Services or according to some other reporting process mutually agreed upon by the state colleges and the Department of Administrative Services.

(6) The Board of Trustees of the Nebraska State Colleges shall provide to the Task Force for Building Renewal semiannual reports concerning the status of each project authorized by this section.

85-418. State College Facilities Program; contracts authorized; limitations.

(1) In order to accomplish any projects authorized by section 85-417, the Board of Trustees of the Nebraska State Colleges may enter into contracts with any person, firm, or corporation providing for the implementation of any such project of the Nebraska state colleges and providing for the long-term payment of the cost of such project from the State College Facilities Program. In no case shall any such contract extend for a period beyond July 15, 2011, nor shall any such contract exceed the repayment capabilities implicit in the funding streams authorized in sections 85-412 and 85-417.

(2) The Board of Trustees of the Nebraska State Colleges shall not pledge the credit of the State of Nebraska for the payment of any sum owing on account of such contract, except that there may be pledged for the payment of any such contract any appropriation specifically made by the Legislature for such purpose, together with such funds of the Board of Trustees as the board determines. No contract shall be entered into pursuant to this section without prior approval by resolution by the Board of Trustees. The Board of Trustees may also convey, lease, or lease back all or any part of the projects authorized by section 85-417 and the land on which such projects are situated to such person, firm, or corporation as the Board of Trustees may contract with pursuant to this

section to facilitate the long-term payment of the cost of such projects. Any such conveyance or lease shall provide that when the cost of such projects has been paid, together with interest and other costs thereon, such projects and the land on which such projects are located shall become the property of the Board of Trustees.

(3) The Board of Trustees of the Nebraska State Colleges is authorized to make expenditures for the purposes stated in this section and section 85-417 from interest income balances in any fund created under the authority provided for in any contract or contracts authorized by this section. Any appropriated amounts and amounts designated or matched by the Board of Trustees under section 85-412 in excess of amounts required to meet debt service and any interest earnings derived from reserve funds or any other funds created under the authority provided for in any contract or contracts authorized by this section shall be accumulated and applied toward early retirement of debt as authorized under any indenture or other contract entered into by the Board of Trustees as authorized by this section. The Board of Trustees and the Department of Administrative Services shall, on or before January 1, 1999, enter into an agreement providing for the allocation and distribution of any balances existing in the State College Facilities Program or any other funds created as part of a long-term contract entered into by the Board of Trustees pursuant to this section to the General Fund and any other funds designated by the Board of Trustees as a source of funds for the match specified in section 85-412 either on July 15, 2011, or when all financial obligations incurred in the contracts entered into by

the Board of Trustees pursuant to this section are discharged, whichever occurs first.

85-1501. Declaration of intent and purpose.

The Legislature hereby declares that for a community college to be truly responsible to the people it serves, primary control of such colleges shall be placed in the citizens within the local area so served subject to coordination by the Coordinating Commission for Postsecondary Education. It is the intent and purpose of sections 85-1501 to 85-1540 to create locally governed and locally supported community college areas with the major educational emphasis on occupational education. Each community college area is intended to be an independent, local, unique, and vital segment of postsecondary education separate from both the established elementary and secondary school system and from other institutions of postsecondary education and is not to be converted into a four-year, baccalaureate-degree-granting institution.

85-1501.01. Financing; legislative intent.

The Legislature recognizes the need for and importance of a strong partnership with the community colleges to assure the continued economic growth of the state. In recognition of that partnership, the Legislature affirms that community colleges should be financed through a funding partnership from property tax, state aid, tuition, and other sources of revenue.

85-1502. Area governance and statewide coordination; legislative intent; association of boards; powers and duties; section, how construed.

It is the intent of the Legislature that a clear distinction between area governance and statewide coordination for the community college areas be recognized and that such coordination is appropriate in order to provide the most cost-effective programs for residents of each community college area. It is further the intent of the Legislature that coordination of the community colleges by the Coordinating Commission for Postsecondary Education be conducted through an association of the boards. All of the boards shall be a part of and shall be represented by such association. Coordination services provided by such association shall include (1) preparation of a system strategic plan, (2) coordination of the budget request for the biennium, (3) facilitation of program-needs assessment and articulation, (4) recommendation and facilitation of the appointment of representatives to committees, boards, commissions, task forces, and any other state-level bodies requesting or requiring participation from the community college system, and (5) facilitation of responses to data and information requests for the system.

All activities conducted pursuant to this section by such association shall be conducted in accordance with sections 84-1408 to 84-1414.

Nothing in this section shall be construed to require or provide for state control of the operations of any community college area or to abridge the governance ability, rights, or responsibilities of any board. Nothing in this section shall be construed to limit the ability or authority

of the commission to fulfill its responsibilities and duties regarding the individual community college areas and the individual community college area campuses.

85-1503. Terms, defined.

For purposes of sections 85-1501 to 85-1540, unless the context otherwise requires:

(1) Community college shall mean an educational institution operating and offering programs pursuant to such sections;

(2) Community college area shall mean an area established by section 85-1504;

(3) Board shall mean the Community College Board of Governors for each community college area;

(4) Full-time equivalent student shall mean, in the aggregate, the equivalent of a registered student who in a twelve-month period is enrolled in (a) thirty semester credit hours or forty-five quarter credit hours of classroom, laboratory, clinical, practicum, or independent study course work or cooperative work experience or (b) nine hundred contact hours of classroom or laboratory course work for which credit hours are not offered or awarded. Avocational and recreational community service programs or courses shall not be included in determining full-time equivalent students or student enrollment;

(5) Contact hour shall mean an educational activity consisting of sixty minutes minus break time and required time to change classes;

(6) Credit hour shall mean the unit used to ascertain the educational value of course work offered by the institution to students enrolling for such course work, earned by such students upon successful completion of such course work, and for which tuition is charged. A credit hour may be offered and earned in any of several instructional delivery systems, including, but not limited to, classroom hours, laboratory hours, clinical hours, practicum hours, cooperative work experience, and independent study. A credit hour shall consist of a minimum of: (a) Ten quarter or fifteen semester classroom contact hours per term of enrollment; (b) twenty quarter or thirty semester academic transfer and academic support laboratory hours per term of enrollment; (c) thirty quarter or forty-five semester vocational laboratory hours per term of enrollment; (d) thirty quarter or forty-five semester clinical or practicum contact hours per term of enrollment; or (e) forty quarter or sixty semester cooperative work experience contact hours per term of enrollment. An institution may include in a credit hour more classroom, laboratory, clinical, practicum, or cooperative work experience hours than the minimum required in this subdivision. The institution shall publish in its catalog, or otherwise make known to the student in writing prior to the student enrolling or paying tuition for any courses, the number of credit or contact hours offered in each such course. Such published credit or contact hour offerings shall be used to determine whether a student is a full-time equivalent student pursuant to subdivision (4) of this section;

(7) Classroom hour shall mean a minimum of fifty minutes of formalized instruction on campus or off campus in which a qualified instructor applying any combination

of instructional methods such as lecture, directed discussion, demonstration, or the presentation of audiovisual materials is responsible for providing an educational experience to students;

(8) Laboratory hour shall mean a minimum of fifty minutes of educational activity on campus or off campus in which students conduct experiments, perfect skills, or practice procedures under the direction of a qualified instructor;

(9) Clinical hour shall mean a minimum of fifty minutes of educational activity on campus or off campus during which the student is assigned practical experience under constant supervision at a health-related agency, receives individual instruction in the performance of a particular function, and is observed and critiqued in the repeat performance of such function. Adjunct professional personnel, who may or may not be paid by the college, may be used for the directed supervision of students and for the delivery of part of the didactic phase of the experience;

(10) Practicum hour shall mean a minimum of fifty minutes of educational activity on campus or off campus during which the student is assigned practical experiences, receives individual instruction in the performance of a particular function, and is observed and critiqued by an instructor in the repeat performance of such function. Adjunct professional personnel, who may or may not be paid by the college, may be used for the directed supervision of the students;

(11) Cooperative work experience shall mean an internship or on-the-job training, designed to provide specialized skills and educational experiences, which is coordinated, supervised, observed, and evaluated by

qualified college staff or faculty and may be completed on campus or off campus, depending on the nature of the arrangement;

(12) Independent study shall mean an arrangement between an instructor and student in which the instructor is responsible for assigning work activity or skill objectives to the student, personally providing needed instruction, assessing the student's progress, and assigning a final grade. Credit hours shall be assigned according to the practice of assigning credits in similar courses;

(13) Full-time equivalent student enrollment total shall mean the total of full-time equivalent students enrolled in a community college in any fiscal year;

(14) General academic transfer course shall mean a course offering in a one-year or two-year degree-credit program, at the associate degree level or below, intended by the offering institution for transfer into a baccalaureate program. The completion of the specified courses in a general academic transfer program may include the award of a formal degree;

(15) Applied technology or occupational course shall mean a course offering in an instructional program, at the associate degree level or below, intended to prepare individuals for immediate entry into a specific occupation or career. The primary intent of the institutions offering an applied technology or occupational program shall be that such program is for immediate job entry. The completion of the specified courses in an applied technology or occupational program may include the award of a formal degree, diploma, or certificate;

(16) Academic support course shall mean a general education academic course offering which may be necessary to support an applied technology or occupational program;

(17) Class I course shall mean an applied technology or occupational course offering which requires the use of equipment, facilities, or instructional methods easily adaptable for use in a general academic transfer program classroom or laboratory;

(18) Class 2 course shall mean an applied technology or occupational course offering which requires the use of specialized equipment, facilities, or instructional methods not easily adaptable for use in a general academic transfer program classroom or laboratory;

(19) Reported aid equivalent student shall mean a full-time equivalent student subject to the following limitations:

(a) The number of credit hours which can be counted for each student per semester or quarter shall be limited to eighteen credit hours;

(b) For students enrolled for more than eighteen credit hours, credit hours for each course shall be prorated as the eighteen-credit-hour limit is to the student's total credit hours for the semester or quarter;

(c) The credit-hour limit for a special instructional term shall be prorated on the same ratio that a fifteen-week term is to eighteen semester credit hours or a ten-week term is to eighteen quarter credit hours; and

(d) The number of credit and contact hours which shall be counted by any community college area in which a

tribally controlled community college is located shall include credit and contact hours awarded by such tribally controlled community college to students for which such institution received no federal reimbursement pursuant to the Tribally Controlled Community College Assistance Act, Public Law 95-471 as reauthorized by Public Law 99-428;

(20) Reported aid equivalent total shall mean the total of all reported aid equivalents accumulated in a community college area in any fiscal year;

(21) Reimbursable educational unit shall mean a reported aid equivalent student multiplied by (a) for a general academic transfer course or an academic support course, a factor of one, (b) for a Class 1 course, a factor of one and fifty-hundredths, (c) for a Class 2 course, a factor of one and eight-tenths for fiscal year 1995-96 and for the three-year averages, a factor of one and nine-tenths for fiscal year 1996-97 and for the three-year averages, and a factor of two for fiscal year 1997-98 and each fiscal year thereafter and for the three-year averages, (d) for a tribally controlled community college general academic transfer course or academic support course, a factor of two, (e) for a tribally controlled community college Class 1 course, a factor of three, and (f) for a tribally controlled community college Class 2 course, a factor of three and six-tenths for fiscal year 1995-96 and for the three-year averages, a factor of three and eight-tenths for fiscal year 1996-97 and for the three-year averages, and a factor of four for fiscal year 1997-98 and each fiscal year thereafter and for the three-year averages;

(22) Reimbursable educational unit total shall mean the total of all reimbursable educational units accumulated in a community college area in any fiscal year;

(23) Special instructional term shall mean any term which is less than fifteen weeks for community colleges using semesters or ten weeks for community colleges using quarters;

(24) Tribally controlled community college shall mean an educational institution operating and offering programs pursuant to the Tribally Controlled Community College Assistance Act, Public Law 95-471 as reauthorized by Public Law 99-428; and

(25) Tribally controlled community college state aid amount shall mean the quotient of the amount of state aid to be distributed pursuant to sections 85-1536 and 85-1537 for the current fiscal year to a community college area in which a tribally controlled community college is located divided by the average of the reimbursable educational unit totals for such community college area for the immediately preceding three fiscal years, with such quotient then multiplied by the average reimbursable educational units derived pursuant to subdivision (19)(d) of this section for the immediately preceding three fiscal years.

85-1504. Community college areas, designated.

The state is hereby divided into six community college areas as follows:

(1) The Western Community College Area shall consist of the following counties: Sioux, Dawes, Sheridan, Box Butte, Scotts Bluff, Banner, Kimball, Morrill, Cheyenne, Garden, Deuel, and Grant and the voting districts of Merriam, Russell, King, Mother Lake, Cody, Barley,

Gillaspie, Lackey, and Calf Creek in Cherry County as such voting districts existed on July 1, 1975;

(2) The Mid-Plains Community College Area shall consist of the following counties: Cherry except as provided in subdivision (1) of this section, Hooker, Thomas, Blaine, Loup, Arthur, McPherson, Logan, Custer, Keith, Lincoln, Perkins, Chase, Hayes, Frontier, Dundy, Hitchcock, and Red Willow;

(3) The Northeast Community College Area shall consist of the following counties: Keya Paha, Brown, Rock, Boyd, Holt, Garfield, Wheeler, Knox, Cedar, Antelope, Pierce, Madison, Wayne, Stanton, Dixon, Dakota, Thurston, Burt, and Cuming and the precincts of North Oakland, South Oakland, Ashland, North Branch, Shell Creek, and Midland in Boone County as such precincts existed on July 1, 1975;

(4) The Central Community College Area shall consist of the following counties: Valley, Greeley, Platte, Colfax, Sherman, Howard, Nance, Merrick, Polk, Butler, Dawson, Buffalo, Hall, Hamilton, Gosper, Phelps, Kearney, Adams, Clay, Furnas, Harlan, Franklin, Webster, and Nuckolls and all of Boone County except as provided in subdivision (3) of this section;

(5) The Southeast Community College Area shall consist of the following counties: Saunders, Cass, York, Seward, Lancaster, Otoe, Fillmore, Saline, Thayer, Jefferson, Gage, Johnson, Nemaha, Pawnee, and Richardson; and

(6) The Metropolitan Community College Area shall consist of the following counties: Dodge, Washington, Douglas, and Sarpy.

85-1505. Community college area; body corporate.

Each community college area shall constitute a body corporate and as such may sue and be sued.

85-1506. Community College Board of Governors; membership.

Each community college area shall be governed by a board composed of eleven members. The governing boards shall be known as the Community College Board of Governors for the community college area the board serves.

85-1507. Boards; officers; quorum required to perform duties.

Each board shall annually elect from among its members a chairperson and a vice-chairperson, each to serve for one year. The board shall appoint a secretary and a treasurer, and one person may hold both such offices. A majority of the members of the board shall constitute a quorum, and no action shall be taken by less than a majority of the members present and voting, except that approval of employee contracts and the appropriation of money from the funds of the community college area shall be by the affirmative vote of a majority of elected members of the board. For purposes of this section, appropriation

shall mean the adoption or modification of budgets for the community college area.

85-1508. Community college area officers and employees; bond.

The officers and employees of a community college area authorized to handle funds shall furnish and maintain a corporate surety bond in an amount, in a form, and with sureties approved by the board. A copy of such bond shall be filed with the Secretary of State. The premium on such bond shall be paid by the community college.

85-1509. Board; members; expenses.

Members of a board shall not receive a per diem. The board may reimburse members for their actual and necessary expenses incurred while carrying out their duties. Mileage expenses shall be computed at the rate provided in section 81-1176. Sections 81-1174, 81-1175, and 81-1177 shall serve as guidelines for the board when determining allowable expenses and reimbursement for such expenses.

85-1510. Community college area; power to indemnify; liability insurance; purchase.

(1) A community college area may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative, other than an action by or in the

right of the community college area, by reason of the fact that he or she is or was a board member or an officer, employee, or agent of the community college area, against expenses, including attorney's fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by him or her in connection with such action, suit, or proceeding if such person acted in good faith and in a manner which he or she reasonably believed to be in or not opposed to the best interests of the community college area and, with respect to any criminal action or proceeding, had no reasonable cause to believe that his or her conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement, or conviction or upon a plea of nolo contendere or its equivalent shall not of itself create presumption that such person did not act in good faith and in a manner which he or she reasonably believed to be in or not opposed to the best interests of the community college area and, with respect to any criminal action or proceeding, had reasonable cause to believe that his or her conduct was unlawful.

(2) A community college area may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action or suit by or in the right of the community college area to procure a judgment in its favor by reason of the fact that he or she is or was a board member or an officer, employee, or agent of the community college area, against expenses, including attorney's fees, actually and reasonably incurred by him or her in connection with the defense or settlement of such action or suit if such person acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the community college area, except that no indemnification shall be made in

respect of any claim, issue, or matter as to which much person was adjudged to be liable for negligence or misconduct in the performance of his or her duty to the community college area unless and only to the extent that the court in which such action or suit was brought determines upon application that, despite the adjudication of liability but in view of all circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which such court deems proper.

(3) To the extent that a board member or an officer, employee, or agent of a community college area has been successful on the merits or otherwise in defense of any action, suit, or proceeding referred to in subsections (1) and (2) of this section or in defense of any claim, issue, or matter in such action, suit, or proceeding, such person shall be indemnified against expenses, including attorney's fees, actually and reasonably incurred by him or her in connection with such defense.

(4) Any indemnification under such subsections, unless ordered by a court, shall be made by the community college area only as authorized in the specific case upon a determination that indemnification of the board member or the officer, employee, or agent of the community college area is proper in the circumstances because he or she has met the applicable standard of conduct set forth in such subsections. Such determination shall be made by the board members by a majority vote of a quorum consisting of board members who were not parties to such action, suit, or proceeding or, if such a quorum is not obtainable or even if obtainable a quorum of disinterested board members so directs, by independent legal counsel in a written opinion.

(5) Expenses incurred in defending a civil or criminal action, suit, or proceeding may be paid by a community college area in advance of the final disposition of such action, suit, or proceeding as authorized in the manner provided in subsection (4) of this section upon receipt of an undertaking by or on behalf of the board member or officer, employee, or agent of the community college area to repay such amount unless it is ultimately determined that he or she is entitled to be indemnified by the community college area as authorized in this section.

(6) The indemnification provided by this section shall not be deemed exclusive of any other rights to which the person indemnified may be entitled under any agreement, either as to action in his or her official capacity or as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a board member or an officer, employee, or agent of a community college area and shall inure to the benefit of the heirs, executors, and administrators of such person.

(7) A community college area may purchase and maintain insurance on behalf of any person who is or was a board member or an officer, employee, or agent of a community college area against any liability asserted against him or her and incurred by him or her in any such capacity or arising out of his or her status as such, whether or not the community college area would have the power to indemnify him or her against such liability under this section.

85-1511. Board; powers and duties; enumerated.

In addition to any other powers and duties imposed upon the community college system or its areas, campuses, or boards by sections 85-917 to 85-966 and 85-1501 to 85-1540 and any other provision of law, each board shall:

(1) Have general supervision, control, and operation of each community college within its jurisdiction;

(2) Subject to coordination by the Coordinating Commission for Postsecondary Education as prescribed in the Coordinating Commission for Postsecondary Education Act, develop and offer programs of applied technology education, academic transfer programs, academic support courses, and such other programs and courses as the needs of the community college area served may require. The board shall avoid unnecessary duplication of existing programs and courses in meeting the needs of the students and the community college area;

(3) Employ, for a period to be fixed by the board, executive officers, members of the faculty, and such other administrative officers and employees as may be necessary or appropriate and fix their salaries and duties;

(4) Subject to coordination by the Coordinating Commission for Postsecondary Education as prescribed in the Coordinating Commission for Postsecondary Education Act, construct, lease, purchase, purchase on contract, operate, equip, and maintain facilities;

(5) Contract for services connected with the operation of the community college area as needs and interest demand;

(6) Cause an examination and comprehensive audit of the books, accounts, records, and affairs, including full-time equivalent student enrollment totals, reported aid equivalent totals, and reimbursable educational unit totals as defined in section 85-1503, to be made annually covering the most recently completed fiscal year. The audit of each area shall include the full-time equivalent student enrollment totals, reported aid equivalent totals, and reimbursable educational unit totals for the three most recently completed fiscal years which shall be used for calculation of aid to the community college areas as prescribed in section 85-1536. The audit shall also include the county-certified property valuations for the community college area for the three most recently completed fiscal years which shall be used for calculation of aid to such community college areas. Such examination and audit of the books, accounts, records, and affairs shall be completed and filed with the Auditor of Public Accounts and the Department of Administrative Services on or before October 15 of each year. The examination and audit of the full-time equivalent student enrollment totals, reported aid equivalent totals, and reimbursable educational unit totals shall be completed and filed with the Auditor of Public Accounts and the Department of Administrative Services on or before August 15 of each year;

(7) Establish fees and charges for the facilities authorized by sections 85-1501 to 85-1540. Each board may enter into agreements with owners of facilities to be used for housing regarding the management, operation, and government of such facilities and may employ necessary employees to govern, manage, and operate such facilities;

(8) Receive such gifts, grants, conveyances, and bequests of real and personal property from public or private sources as may be made from time to time, in trust or otherwise, whenever the terms and conditions thereof will aid in carrying out the community college programs as specified by law. Each board may sell, lease, exchange, invest, or expend such gifts, grants, conveyances, and bequests or the proceeds, rents, profits, and income therefrom according to the terms and conditions thereof and adopt and promulgate rules and regulations governing the receipt and expenditure of such proceeds, rents, profits, and income, except that acceptance of such gifts, grants, or conveyances shall not be conditioned on matching state or local funds;

(9) Prescribe the courses of study for any community college under its control and publish such catalogs and bulletins as may be necessary;

(10) Grant to every student upon graduation or completion of a course of study a suitable diploma, associate degree, or certificate;

(11) Adopt and promulgate such rules and regulations and perform all other acts as the board may deem necessary or appropriate to the administration of the community college area. Such rules and regulations shall include, but not be limited to, rules and regulations relating to facilities, housing, scholarships, discipline, and pedestrian and vehicular traffic on property owned, operated, or maintained by the community college area;

(12) Employ, for a period to be fixed by the board, an executive officer for the community college area and, by written order filed in its office, delegate to such executive officer any of the powers and duties vested in or imposed

upon it by sections 85-1501 to 85-1540. Such delegated powers and duties may be exercised in the name of the board;

(13) Acquire real property by eminent domain pursuant to sections 76-701 to 76-724;

(14) Acquire real and personal property and sell, convey, or lease such property whenever the community college area will be benefited thereby. The sale, conveyance, or lease of any real estate owned by a community college area shall be effective only when authorized by an affirmative vote of at least two-thirds of all the members of the board;

(15) Enter into agreements for services, facilities, or equipment and for the presentation of courses for students when such agreements are deemed to be in the best interests of the education of the students involved;

(16) Transfer tribally controlled community college state aid amounts to a tribally controlled community college located within its community college area;

(17) Invest, after proper consideration of the requirements for the availability of money, funds of the community college in securities the nature of which individuals of prudence, discretion, and intelligence acquire or retain in dealing with the property of another;

(18) Establish tuition rates for courses of instruction offered by each community college within its community college area. Separate tuition rates shall be established for students who are nonresidents of the State of Nebraska;

(19) Establish a fiscal year for the community college area which conforms to the fiscal year of the state; and

(20) Exercise any other powers, duties, and responsibilities necessary to carry out sections 85-1501 to 85-1540.

85-1512. Boards; establish election districts; nomination and election of members; qualifications.

Each board shall divide the community college area into five election districts as nearly equal in population as may be practicable and shall transmit the appropriate information pertaining to such election districts to the Secretary of State and to the appropriate election officials within the area. Board members shall be nominated and elected as provided in section 32-514. To be eligible for membership on the board, a person shall be a registered voter and shall have been a resident of the area for six months and, for members representing a district, a resident of the district for six months. No person shall be eligible to membership on a community college board of governors who is an elected or appointed member of any other board relating to education. Each member elected to represent a district shall be a resident of the district.

85-1513. Repealed. Laws 1994, LB 76, s. 615.

85-1514. Vacancy on board; procedure to fill; qualifications of member filling vacancy.

(1) In addition to the events listed in section 32-560, a vacancy on any board shall exist in the event of the removal of a board member from the community college

area for board members elected at large or community college district for board members elected by district. After notice and hearing, a vacancy shall also exist when any board member is absent from more than three consecutive regular meetings of the board unless such absences are excused by a majority of the remaining board members. In the event of a vacancy from any of such causes or otherwise, such vacancy shall be filled by the remaining board members for the balance of the unexpired term. Any person so named to fill a vacancy shall have the same qualifications as his or her immediate predecessor. Such appointment shall be made in writing and certified to the office of the Secretary of State.

(2) If after a primary election there is a vacancy upon the ballot, such vacancy shall be filled by a petition candidate pursuant to section 32-625.

(3) An incumbent shall not be permitted to hold over the term, but such office shall automatically become vacant and an appointment shall be made within one calendar month to fill such vacancy for the ensuing term. If there are vacancies in the offices of a majority of the members of the board, the Secretary of State shall conduct a special election to fill such vacancies.

85-1515. Board; power to sell revenue and general obligation bonds; purpose; sinking fund; purpose; election required; when; state liability.

Each board may issue and sell revenue bonds and general obligation bonds for the purchase, construction, reconstruction, equipping, demolition, or alteration of capital assets, including accessibility barrier elimination

project costs and abatement of environmental hazards as such terms are defined in section 79-10,110, and the acquisition of sites, rights-of-way, easements, improvements, or appurtenances and other facilities connected with the operation of the community colleges. Each board may establish in its budget a capital improvement and bond sinking fund. Such fund shall be used (1) first for the retirement of bonds assumed by the board in accordance with the provisions of such bonds, (2) then for (a) renewal work and deferred maintenance as defined in section 81-173, (b) handicapped access and life safety improvements made to existing structures or grounds including accessibility barrier elimination project costs and abatement of environmental hazards as such terms are defined in section 79-10,110, and (c) projects designed to prevent or correct a waste of energy, including measures taken to utilize alternate energy sources, all in accordance with the capital facilities plan of the community college area, (3) then for the retirement of bonds issued pursuant to this section, and (4) then for the purchasing, purchasing on contract, constructing, and improving of facilities necessary to carry out sections 85-1501 to 85-1540. Revenue bonds issued shall be subject to sections 85-1520 to 85-1527. No general obligation bonds shall be issued without the approval by a majority vote of the qualified electors of the community college area voting in an election called for such purpose pursuant to section 85-1518. No bonds issued under sections 85-1501 to 85-1540 shall be an obligation of the State of Nebraska, and no state tax shall be levied to raise funds for the payment thereof or interest thereon.

85-1516. Board; power to issue warrants; purpose; limitation; obligation of area; how paid.

Each board may issue warrants in an amount necessary to finance the operating expenses of the community college area until the proceeds of the tax levy as provided in section 85-1517 are received. The amount of such warrants plus interest shall not exceed the amount of the money to be received from the property tax levy. Whenever such warrants are issued, they shall be the general obligation of the community college area and the full faith and credit of the community college area shall be pledged to retire such warrants. In addition the board shall set aside from the proceeds of the property tax levied pursuant to sections 85-1501 to 85-1540 an amount sufficient to pay the warrants and the interest on such warrants. Such warrants shall be subject to registration as provided in sections 77-2201 to 77-2215.

85-1517. Board; power to certify tax levy; limit; purpose; approval required to raise levy over limit; how collected.

(1) The board may certify to the county board of equalization of each county within the community college area a tax levy not to exceed seven cents for fiscal year 1998-99 and fiscal year 1999-00 and six cents for fiscal year 2000-01 and all subsequent fiscal years, on each one hundred dollars on the taxable valuation of all property subject to the levy within the community college area, uniform throughout such area, for the purpose of supporting operating expenditures of the community college area.

(2)(a) In addition to the levy provided in subsection (1) of this section, the board may certify to the county board of equalization of each county within the community college area a tax levy of not to exceed one cent on each one hundred dollars on the taxable valuation of all property within the community college area, uniform throughout such area, for the purpose of establishing a capital improvement fund and bond sinking fund as provided in section 85-1515.

(b) In addition to the levy provided in subdivision (a) of this subsection, the board may also certify to the county board of equalization of each county within the community college area a tax levy on each one hundred dollars on the taxable valuation of all property within the community college area, uniform throughout such area, in the amount which will produce funds only in the amount necessary to pay for funding accessibility barrier elimination project costs and abatement of environmental hazards as such terms are defined in section 79-10,110. Such tax levy shall not be so certified unless approved by an affirmative vote of a majority of the board taken at a public meeting of the board following notice and a hearing. The board shall give at least seven days' notice of such public hearing and shall publish such notice once in a newspaper of general circulation in the area to be affected by the increase.

(3) The levy provided by subdivision (2)(a) of this section may be exceeded by that amount necessary to retire the general obligation bonds assumed by the community college area or issued pursuant to section 85-1515 according to the terms of such bonds or for any obligation pursuant to section 85-1535 entered into prior to January 1, 1997.

(4) Such tax shall be levied and assessed in the same manner as other property taxes and entered on the books of the county treasurer. The proceeds of such tax, as collected, shall be remitted to the treasurer of the board not less frequently than once each month.

85-1518. Tax funds; voter approval required; procedure.

(1) If a board determines that it is necessary for the proper management and operation of the community college area to expend tax funds in a manner requiring a vote of the people, the board may by resolution place the proposition for such expenditure on the general or primary ballot or call for a special election in such area for the purpose of approving such expenditure. The proposition appearing on the ballot in any election shall state the purpose for which such tax funds will be spent and the amount of funds to be so expended. Such proposition shall be adopted if approved by a majority of those voting in such election.

(2) The resolution calling for the election and the election notice shall show the proposed purpose for which such tax funds will be expended and the amount of money sought.

(3) Notice of the election shall state the date of the election and the hours the polls will be open. Such notice shall be published in a newspaper that is published in or of general circulation in such community college area at least twenty days prior to such election. If no newspaper is published in or of general circulation in the community college area, notice shall be posted at least twenty days

prior to such election in at least two public places in each county in the community college area.

(4) If a special election is called, the board shall prescribe the form of the ballot to be used.

85-1519. Capital construction project; bids; board; adopt plans and specifications.

Each board shall adopt plans and specifications in advance of letting bids for any capital construction project. Such plans and specifications shall be the basis upon which the bids are received.

85-1520. Facilities; construct, purchase, repair, and equip; revenue bonds; authorized.

Each board may construct, purchase, or otherwise acquire, remodel, repair, furnish, and equip dormitories, residence halls, single-dwelling units, multiple-dwelling units, or other facilities for (1) the housing or boarding of single or married students, faculty, or other employees of the institution under its control, (2) buildings and structures for student and faculty unions or centers, and (3) the medical care and other activities of the students of such institutions, on real estate owned or controlled by such board or on real estate purchased, leased, or otherwise acquired for such purpose and pay the cost thereof, including the cost of such real estate, by issuing revenue bonds payable solely out of the revenue from such buildings or facilities. Any such buildings or facilities shall be located

on or adjacent to a campus or campuses controlled by such board.

85-1521. Revenue bonds; pledge of revenue; payment; board; powers and duties; bonds not obligation of state.

Each board may, by resolution or agreement, pledge all or any part of the revenue and fees derived from the operation of the dormitories, residence halls, single-dwelling units, multiple-dwelling units, buildings, and other facilities for housing, boarding, medical care, and other activities of students, faculty, or employees of the institution under its control erected or acquired or previously erected or acquired by any such board and contract as to the care, insurance, management, and operation of such buildings and facilities and the charges to be made and the rights of the holders of the revenue bonds. When any board contracts that the operation of any building or facility or part thereof shall be performed other than by the board itself, such board shall at all times maintain supervision of and control over the fees and charges imposed for the use of such building, facility, or part. In issuing revenue bonds and pledging revenue therefor, the board may pledge all or any part of the revenue and fees from buildings and facilities other than the building or facility to be constructed. Bonds issued under sections 85-1520 to 85-1527 shall not be an obligation of the State of Nebraska, and no tax shall ever be levied to raise funds for the payment thereof or interest thereon. The bonds shall constitute limited obligations of the board issuing the same and shall be paid solely out of money derived from

the revenue and earnings pledged as provided in sections 85-1501 to 85-1540.

85-1522. Revenue bonds; where payable.

All revenue bonds issued pursuant to sections 85-1515 and 85-1520 to 85-1527 may be payable at the office of the State Treasurer, at such bank or trust company, either within or without the State of Nebraska, or at such other place as may be determined by the board.

85-1523. Revenue bond proceeds; use; board; establish charges.

The proceeds of revenue bonds provided for in section 85-1515, 85-1520, or 85-1521 shall be used solely for the purpose for which the bonds are issued and for the expenses of issuing such bonds. The board shall establish and maintain a schedule of rates, fees, or charges for the use of the facilities constructed or acquired by the issuance of revenue bonds and other facilities controlled by the board, the revenue of which, in whole or in part, is pledged to the holder of the bonds, which shall be in an amount at least sufficient, on the amortization plan, to pay the operating and maintenance charges of the facilities and the principal and interest representing the indebtedness against the income and revenue therefrom.

85-1524. Revenue refunding bonds; authorized.

For the purpose of refunding any revenue bonds which may have been issued and are outstanding, the respective boards may issue revenue refunding bonds in the same manner as provided in sections 85-1520 to 85-1527 for the issuance of revenue bonds.

85-1525. Board; furnish utilities.

Each board may furnish heat, light, power, and other similar utilities to any facility or for any activities covered by sections 85-1515 and 85-1520 to 85-1527 without charging for the provision of such utilities against the revenue derived from such facility or activity.

85-1526. Bonds; interest; exempt from taxation.

In issuing revenue bonds pursuant to section 85-1515 or sections 85-1520 to 85-1527, the board issuing such bonds shall be a governmental subdivision and instrumentality of the State of Nebraska and all bonds issued under the authority of such sections, together with interest on such bond, shall be wholly exempt from taxation.

85-1527. Board; bonds; powers.

Each board may do any and all things necessary and convenient to carry out the purposes and intent of sections 85-1515 and 85-1520 to 85-1527.

85-1528. Teachers and school nurses; contract; renewal; exceptions; amend or terminate; notice; hearings; decision.

The contracts of the teaching staff and school nurses employed by a board of a community college shall require the sanction of a majority of the members of the board. Except as provided in section 85-1534, each such contract shall be deemed renewed and in force and effect until a majority of the board votes, sixty days before the close of the contract period, to amend or terminate the contract for just cause. The secretary of the board shall notify each teacher or school nurse in writing at least ninety days before the close of the contract period of any conditions of unsatisfactory performance or a reduction in teaching staff or nursing staff that the board considers may be just cause to either amend or terminate the contract for the ensuing year. Any teacher or school nurse so notified shall have the right to file within five days of receipt of such notice a written request with the board for a hearing before the board. Upon receipt of such request, the board shall order the hearing to be held within ten days and shall give written notice of the time and place of the hearing to the teacher or school nurse. At the hearing, evidence shall be presented in support of the reasons given for considering amendment or termination of the contract, and the teacher or school nurse shall be permitted to produce evidence related thereto. The board shall render the decision to amend or terminate a contract based on the evidence produced at the hearing.

85-1529. Teachers and school nurses; additional contract rights; not affected.

This section and section 85-1528 shall be construed as providing a minimum standard and not as repealing any rule, regulation, order, or other action of a board that provides for additional contract rights pertaining to the same subject matter.

85-1530. Board; adopt reduction-in-force policy; contents.

Each board shall adopt a reduction-in-force policy covering employees subject to such statutory provisions to carry out the intent of sections 85-1530 to 85-1533. No such policy shall allow the reduction of a permanent or tenured employee while a probationary employee is retained to render a service which such permanent employee is qualified by reason of certification and endorsement to perform or, if certification is not applicable, by reason of college credits in the teaching area. If employee evaluation is to be included as a criterion to be used for reduction in force, specific criteria, such as frequency of evaluation, evaluation forms, and number and length of classroom observations shall be included as part of the reduction-in-force policy.

85-1531. Reduction in force; board and administration; duties.

Before a reduction in force occurs, the board and administration shall present competent evidence demonstrating that a change in circumstances has occurred,

necessitating a reduction in force. Any alleged change in circumstances shall be specifically related to the teacher or teachers to be reduced in force, and the board, based upon evidence produced at the hearing required by section 85-1528 shall be required to specifically find that there are no other vacancies on the staff for which the employee to be reduced is qualified by endorsement or professional training to perform.

85-1532. Reduction in force; employee; contract terminated; effect; recall; rights.

Any employee whose contract is terminated because of reduction in force shall be considered to have been dismissed with honor and shall upon request be provided a letter to that effect. Such employee shall have preferred rights to reemployment for a period of twenty-four months commencing at the end of the contract year of such employee, and the employee shall be recalled on the basis of length of service to the community college area to any position for which he or she is qualified by endorsement or college preparation to teach. The employee shall, upon reappointment, retain any benefits which had accrued to such employee prior to termination, but such leave of absence shall not be considered as a year of employment by the area. An employee under contact to another educational institution may waive recall, but such waiver shall not deprive the employee of his or her right to subsequent recall.

85-1533. Reduction in force; noncompliance with federal or state law; how treated.

Notwithstanding sections 85-1530 to 85-1532, if the reduction of an employee based upon the provisions of such sections would place a community college area in noncompliance of any federal or state law or regulations requiring affirmative action employment practices, the area may vary from the provisions of such sections as necessary to comply with such laws or regulations.

85-1534. Contract; probationary period required.

Any contract of employment entered into after September 9, 1993, between the teaching staff and a board which applies to the first two years of the employment of such teaching staff shall provide that the first two years of the employment of such teacher are a probationary period. Any such contract may be terminated during the probationary period without cause.

85-1535. Facilities for applied technology educational programs; contracts authorize; costs.

A board of a community college area with a population of less than one hundred thousand according to the last federal decennial census and a campus located on a former military base may enter into contracts with any person, firm, or corporation providing for the implementation of any project for the constructing and improving of facilities to house applied technology educational programs necessary to carry out sections 85-1501 to 85-1540 and providing for the long-term payment of the cost of such project.

In no case shall any such contract run for a period longer than twenty years or shall the aggregate of existing contracts exceed four million five hundred thousand dollars for each area exclusive of administrative costs, credit enhancement costs, financing costs, capitalized interest, and reserves dedicated to secure payment of contracts.

No contract shall be entered into pursuant to this section without prior approval by a resolution of the board and the approval of the Coordinating Commission for Postsecondary Education.

The long-term payment of the cost of such project shall be paid from revenue to be raised pursuant to subdivision (2)(a) of section 85-1517. Any board entering into such contract for the construction and improvement of facilities from revenue to be raised pursuant to such subdivision shall make annual appropriations for amounts sufficient to pay annual obligations under such contract for the duration of such contract.

The board may also convey or lease and lease back all or any part of the project and the land on which such project is situated to such person, firm, or corporation as the board may contract with pursuant to this section to facilitate the long-term payment of the cost of such project. Any such conveyance or lease shall provide that when the cost of such project has been paid, together with interest and other costs thereon, such project and the land on which such project is located shall become the property of the community college area.

85-1536. Legislature; appropriate funds; legislative intent; how allocated, adjusted, and distributed.

(1) The Legislature, in an effort to promote quality postsecondary education and to avoid excessive and disproportionate taxation upon the taxable property of each community college area, may appropriate each biennium from such funds as may be available an amount for aid and assistance to the community colleges. The Legislature recognizes that education, as an investment in human resources, is fundamental to the quality of life and the economic prosperity of Nebraskans and that aid to the community colleges furthers these goals. It is the intent of the Legislature that such appropriations, in particular equalization aid provided in this section and section 85-1536.01, reflect the commitment of the Legislature to join with local governing bodies in a strong and continuing partnership to further advance the quality, responsiveness, access, and equity of Nebraska's community colleges and to foster high standards of performance and service so that every citizen, community, and business will have the opportunity to receive quality educational programs and services regardless of the size, wealth, or geographic location of the community college area or tribally controlled community college by which that citizen, community, or business is served. Such funds so appropriated by the Legislature shall be allocated, adjusted, and distributed to the boards by the Department of Administrative Services as follows:

(a) Fifty-two percent of such funds appropriated by the Legislature for each fiscal year shall be allocated to the community college areas in the same proportion as the first one thousand seven hundred seventy-five audited reimbursable educational units or portion thereof of the

three-year average for each community college area, calculated by taking the average of the audited reimbursable educational units for the three most recently completed fiscal years, is to the first one thousand seven hundred seventy-five audited reimbursable educational units or portion thereof of the three-year average of all community college areas combined for such fiscal year;

(b) Thirty-eight percent of such funds for each fiscal year shall be distributed to the community college areas in the same proportion as the three-year average of all audited reimbursable educational units in excess of one thousand nine hundred seventy-five for each community college area, calculated by taking the average of the audited reimbursable educational units for the three most recently completed fiscal years, is to the audited reimbursable educational units in excess of one thousand nine hundred seventy-five for all community college areas, calculated by taking such average, combined for such fiscal year; and

(c) The balance of such funds for each fiscal year shall be distributed pursuant to section 85-1536.01. Funding for tribally controlled community colleges shall be calculated on the total amount of funds available pursuant to this section and section 85-1537.

(2) The Department of Administrative Services shall distribute the total of such appropriated and allocated funds from subdivisions (1)(a) and (b) of this section to the boards in ten as nearly as possible equal monthly payments between the fifth and twentieth day of each month beginning in September of each year.

(3) The Department of Administrative Services shall reduce the amount of the distribution to a board by the

amount of funds used by the community college area to provide a program or capital construction project as such term is defined in section 85-1402 which has not been approved or has been disapproved by the Coordinating Commission for Postsecondary Education pursuant to the Coordinating Commission for Postsecondary Education Act.

85-1536.01. Community College Property Tax Relief and Equalization Program; created; legislative intent; distribution of funds.

(1) The Community College Property Tax Relief and Equalization Program is created. The Legislature recognizes the need for a state and local partnership for the funding of community colleges. The Legislature also understands that some community college areas have a better ability than other areas to raise revenue through property taxes because of larger and growing valuation bases.

(2) It is the intent of the Legislature to appropriate funds beginning with fiscal year 1998-99 to provide property tax relief to those areas that (a) have levied the maximum allowable property tax levy as described in subsection (1) of section 85-1517 and cannot generate forty percent of their operating revenue or (b) do not receive forty percent of their operating revenue from state aid pursuant to subdivisions (1)(a) and (b) of section 85-1536 and levy the maximum allowable property tax levy as described in subsection (1) of section 85-1517 or the greater of a minimum levy of six and three-tenths cents per one hundred dollars of valuation for fiscal year 1998-99 and fiscal year 1999-00 and five and three-tenths cents

per one hundred dollars of valuation for fiscal year 2000-01 and all subsequent fiscal years or a levy that raises forty percent of its operating revenue.

(3) Each eligible community college area which qualifies pursuant to subdivision (2)(a) of this section shall receive funds equal to the difference between the property tax revenue raised and forty percent of its operating revenue. Each eligible community college area which qualifies pursuant to subdivision (2)(b) of this section shall receive funds equal to the difference between state aid pursuant to subdivisions (1)(a) and (b) of section 85-1536 and forty percent of its operating revenue, and any community college area which raises in excess of forty percent of its operating revenue from property tax shall have such excess serve as an offset to payments received from this program. Any community college area which qualifies under both subdivisions (2)(a) and (b) of this section shall receive funds as calculated for both subdivisions. The base year for calculating forty percent of operating revenue shall be fiscal year 1997-98, with future adjustments reflecting increases equal to two percent plus the percentage increase, if any, in full-time equivalent students eligible for state aid from the second year to the first year preceding the year for which the aid is being determined.

Any community college area which had an operational property tax levy that was one hundred thirty-five percent or more of the statewide average operational community college property tax levy for fiscal year 1997-98 shall, for purposes of state aid distribution beginning in fiscal year 1999-00 and for each fiscal year thereafter, have added to its fiscal year 1997-98 base year revenue three-fourths of its unused budget authority as established under section 13521 for fiscal year 1998-99. Each community college

area shall submit its levy and valuation certification to the Department of Administrative Services by September 20 each year. After verifying valuations and general fund revenue amounts established from FTE-REU audits, which general fund revenue amounts are derived from the uniform budget form, the department shall distribute funds to those community college areas that have qualified for property tax relief and equalization. If the Legislature fails to appropriate adequate funds for the program, the funds appropriated. shall be apportioned on a pro rata basis to the areas that qualify.

(4) The department shall distribute the total of such appropriated and allocated funds to the boards in nine as nearly as possible equal monthly payments between the fifth and twentieth day of each month beginning in October of each year.

85-1537. Aid to community colleges; additional appropriation.

For each fiscal year, the Legislature shall appropriate an additional two million one hundred eighty-seven thousand dollars for aid to community colleges. Such amount shall be in addition to any other amounts appropriated for aid to community colleges and shall be distributed pursuant to sections 85-1536 and 85-1538.

85-1537.01. Legislative appropriation; allocation.

If the Legislature appropriates more money for aid to community colleges than is necessary to fully fund the provisions of sections 85-1536 to 85-1537 for any fiscal

year, the excess money shall be allocated to each community college area in the same proportion as the community college area's property valuation is to the state's total property valuation.

85-1538. Director of Administrative Services; pay warrants; procedure.

The Director of Administrative Services shall, upon notification by the State Treasurer that sufficient funds are available for payment, draw warrants on vouchers presented by the budget division of the Department of Administrative Services against funds appropriated and deliver such warrants to the various community colleges.

85-1539. Nebraska Community College Aid, Grant, and Contract Review Committee; created; duties.

There is hereby created the Nebraska Community College Aid, Grant, and Contract Review Committee. The committee shall be selected by the Director of Administrative Services and shall consist of (1) a representative of the University of Nebraska who has expertise and experience in research and development, (2) a representative of the Department of Economic Development, (3) a representative of the Department of Labor, (4) a representative of the State Department of Education, and (5) a representative of the community colleges.

The committee shall develop guidelines and submit recommendations to the Director of Administrative Services for the distribution of the Nebraska Community College Aid Cash Fund and any other funds appropriated

to Program 99 in Agency 83, Aid to Community Colleges, pursuant to any directives of the Governor or the Legislature. Recommendations made by the committee shall not exceed the amount appropriated to the fund.

85-1540. Nebraska Community College Aid Cash Fund; created; use; investment.

There is hereby created the Nebraska Community College Aid Cash Fund. The fund shall be under the direction of the Nebraska Community College Aid, Grant, and Contract Review Committee. The Legislature may appropriate nongeneral funds and transfers pursuant to subdivision (1)(b)(iii) of section 48-621 to the fund. The fund shall be used to provide aid, grants, or contracts to the community colleges for the purposes of funding grants for applied technology and occupational faculty training, instructional equipment upgrades, employee assessment, preemployment training, employment training, and dislocated worker programs benefiting the State of Nebraska. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

85-1541. Activities pass; volunteer, defined.

For purposes of section 85-1542, volunteer shall mean a person who is not an elected or appointed official or employee of a community college area who, at the request or with the permission of the board of governors of the community college area, engages in activities related to

the purposes and functions of the community college area or for its general benefit.

85-1542. Activities pass; authorized; when.

The board of governors of any community college area may authorize the issuance of a pass to any elected or appointed official, employee, retired employee, or volunteer of the community college area, member of a senior citizens group, or city official authorizing the admittance of the recipient of the pass and his or her spouse to recognized college activities without the need for the payment of any fee or charge. Such pass may be issued at no cost to the recipient or at such cost as may be designated by the board of governors.

86-574. Dark fiber, defined.

For purposes of sections 86-574 to 86-578, dark fiber means any unused fiber optic cable through which no light is transmitted or any installed fiber optic cable not carrying a signal.

86-575. Agency or political subdivision; dark fiber; disposition; powers.

(1) Any agency or political subdivision of the state may:

(a) Own dark fiber;

(b) Sell dark fiber pursuant to section 86-576; and

(c) Lease dark fiber pursuant to section 86-577.

(2) No agency or political subdivision of the state shall provide telecommunications services for a fee, except as authorized in sections 79-1319, 81-1120.01 to 81-1120.28, 85-401 to 85-418, and 85-1501 to 85-1542, or be issued a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier. Any agency or political subdivision which sells or leases its dark fiber pursuant to sections 86-574 to 86-578 shall not be deemed to be providing telecommunications services for a fee.

86-576. Agency or political subdivision; dark fiber; sale.

Any agency or political subdivision of the state may sell its dark fiber by any method, including auction, sealed bid, or public sale, which it deems to be most advantageous to the public. The sales agreement may require that the agency or political subdivision be solely responsible for the maintenance of the dark fiber and that the buyer is responsible, on a pro rata basis, for any such maintenance costs.

86-577. Agency or political subdivision; dark fiber; lease.

Any agency or political subdivision of the state may lease its dark fiber if:

(1) The lessee is a certificated telecommunications common carrier or a permitted telecommunications

contract carrier pursuant to section 86-128 or an Internet service provider;

(2) The lease price and profit distribution is approved by the Public Service Commission as follows:

(a) The commission shall not approve any lease price which is less than the market rate for leasing such fiber as determined by the commission. The market rate is the price associated with similar unbundled network elements that may be available from the incumbent local exchange carrier or the price of any other private entity leasing dark fiber optic facilities serving the same or similar territory where the leased equipment is located. Before entering into a lease, each agency or political subdivision shall file a request with the commission for a competitive price comparison to determine the market rate. When conducting a competitive price comparison, the commission in its discretion shall use rate schedules, interconnection agreements, or other documents within its regulatory oversight and shall gather other market rate information as deemed necessary;

(b) The commission shall not approve any lease price which is agreed upon by the agency or political subdivision and the lessee unless the lease requires that the agency or political subdivision be solely responsible for the maintenance of its dark fiber and that the lessee be responsible, on a pro rata basis, for any such maintenance costs; and

(c) The commission shall not approve any lease unless fifty percent of the profit earned by the agency or political subdivision under the lease is remitted to the Nebraska Internet Enhancement Fund. Profit earned by the agency or political subdivision is the lease price less the cost of infrastructure overbuilding. Before entering

into a lease, each agency or political subdivision shall file a request with the commission to determine the cost of overbuilding its fiber optic infrastructure. For purposes of this subdivision, cost of infrastructure overbuilding means the cost of each leased optic fiber, including the cost, on a pro rata basis, associated with the agency's or political subdivision's installation of such fiber;

(3) Any interconnection agreement subject to section 86-122 is approved by the commission; and

(4) The lessee makes every reasonable effort to activate the maximum amount of the leased fiber as is possible, within one year after entering into the lease, unless good cause is shown.

86-578. Dark fiber; violation; procedure.

An original action or appeal concerning a violation of any provision of sections 86-574 to 86-578 by an agency or political subdivision of the state shall follow the procedures set forth in section 75-132.01.

IN THE SUPREME COURT OF NEBRASKA

IN RE APPLICATION OF LES, CITY OF LINCOLN d/b/a LINCOLN ELECTRIC SYSTEM, Appellant, v. NEB. CABLE COMM. ASS'N, NEBRASKA TELECOMMS. ASSOCIATION, et al.	)	Case No. S-01-0286 ***APPELLEE NEBRASKA TELECOMMUNICATION ASSOCIATION'S MOTION FOR REHEARING***

Appellee/Intervenor Nebraska Telecommunications Association (the "NTA"), pursuant to Rule 13 of the RULES OF PRACTICE AND PROCEDURE OF THE SUPREME COURT OF NEBRASKA, respectfully moves the Court for an Order granting a rehearing of the above-entitled case. The grounds in support of this Motion are set forth in the accompanying Brief of Appellee/Intervenor Nebraska Telecommunications Association, which is being submitted in conjunction herewith.

WHEREFORE, the NTA respectfully requests that the Court enter an Order granting this Motion in all respects.

Respectfully submitted this 21st day of January, 2003.

NEBRASKA TELECOMMUNICATIONS ASSOCIATION, Appellee/Intervenor

BY: HARDING, SHULTZ & DOWNS
and JACK L. SHULTZ – 15472
GREGORY D. BARTON – 18759
800 Lincoln Square
121 S. 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 434-3000

By: /s/ Jack L. Shultz
One of Appellee's/Intervenor's
Attorneys

IN THE SUPREME COURT OF NEBRASKA

IN RE APPLICATION OF LES, CITY OF LINCOLN d/b/a LINCOLN ELECTRIC SYSTEM, Appellant, v. NEB. CABLE COMM. ASS'N, NEBRASKA TELECOMMS. ASSOCIATION, et al.	)	Case No. S-01-0286 ***APPELLEE NEBRASKA TELECOMMS. ASSOCIATION'S MOTION FOR SUMMARY DISMISSAL OF APPEAL***

Appellee/Intervenor Nebraska Telecommunications Association (the "NTA"), pursuant to Rule 7(B)(1) of the RULES OF PRACTICE AND PROCEDURE OF THE SUPREME COURT AND COURT OF APPEALS OF NEBRASKA, respectfully moves this Court for an Order dismissing this appeal by Appellant City of Lincoln, d/b/a Lincoln Electric System ("LES"), on the basis that this Court lacks jurisdiction to hear this appeal. The NTA's Motion is based upon the arguments and authorities discussed at pages 9-19 of the Brief of Appellee/Intervenor, which was filed with the Court on August 23, 2001, including the following grounds:

1. This appeal is jurisdictionally-defective because the issues raised by LES in this appeal, all of which pertain to whether LES lacks legal authority to engage in the private, for hire telecommunications contract carrier business have been rendered moot by the enactment of LB 827.

2. On May 21, 2001, the Nebraska Legislature passed LB 827. LB 827, 97th Leg., 1st Sess., 2001 Neb. Laws, NEB. LEG. J., pp. 2194-2195 (May 21, 2001). On May 25, 2001, the Governor signed LB 827. NEB. LEG. J., p. 2269 (May 29, 2001).

3. The terms of LB 827 provide in relevant part: (A) "No . . . political subdivision of the state shall . . . be issued a . . . permit as a telecommunications contract carrier"; and (B) "The commission shall not issue a . . . permit as a telecommunications contract carrier to a[ ] . . . political subdivision of the state." LB 827, Sec. 2, ¶ 2, and Sec. 19. The Legislature's enactment of LB 827 expressly deprives LES of authority to provide contract carrier telecommunications services.

4. Since the Ninety-Seventh Legislature adjourned on May 31, 2001, LB 827 became effective on August 31, 2001. ***See***, NEB. CONST., art. III, § 27.

5. Since LB 827 has become the law of Nebraska, the issues raised in this appeal, all of which pertain to LES's claimed legal authority to engage in the telecommunications contract carrier business, have "ceased to exist." ***Maack v. School Dist. of Lincoln***, 241 Neb. 847, 849, 491 N.W.2d 341, 344 (1992). Thus, LES's appeal should be dismissed as moot because the enactment of LB 827 "prevent[s] [this] appellate court from granting [LES] any effectual relief in case of a decision in [its] favor." ***Koenig v. Southeast Community College***, 231 Neb. 923, 438 N.W.2d 791 (1989).

WHEREFORE, the NTA respectfully requests that the Court enter an Order dismissing LES's pending appeal for lack of jurisdiction and taxing to LES all costs incurred herein.

Respectfully submitted this 31st day of August, 2001.

NEBRASKA TELECOMMUNICATIONS ASSOCIATION, Appellee/Intervenor

BY: HARDING, SHULTZ & DOWNS
and JACK L. SHULTZ – 15472
GREGORY D. BARTON – 18759
800 Lincoln Square
121 S. 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 434-3000

By: /s/ Jack L. Shultz
One of Appellee's/Intervenor's
Attorneys

IN THE SUPREME COURT OF NEBRASKA

IN THE MATTER OF THE APPLICATION OF LINCOLN ELECTRIC SYSTEM SEEKING CONTRACT CARRIER PERMIT AUTHORITY.	Case No. S-01-0286 NOTICE OF CONSTITUTIONAL QUESTION

COMES NOW the Appellant, City of Lincoln d/b/a Lincoln Electric System, and, pursuant to Nebraska Supreme Court Rule 9E, hereby gives notice that the above-captioned case now involves a question of the constitutionality of Section 2 of LB 827 as passed by the First Session of the Ninety-Seventh Legislature of Nebraska. The Appellant alleges that it is unconstitutional under the Supremacy Clause of the United States Constitution.

CITY OF LINCOLN,
d/b/a Lincoln Electric
System, Appellant,

By: /s/ William F. Austin
William F. Austin, #10140
ERICKSON &
SEDERSTROM, P.C.
301 South 13th Street,
Suite 400
Lincoln, NE 68508
(402) 476-1000

BEFORE THE
NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application of Lincoln Electric System for Contract Carrier Permit Authority.	))))	Application No. C-2400

PETITION FOR FORMAL INTERVENTION

COMES NOW the Nebraska Telecommunications Association, hereinafter referred to as Intervenor, and pursuant to Rule 15.01 of the Rules of Commission Procedure, petitions to Formally Intervene in the above-entitled matter. In support of this Petition, Intervenor respectfully states as follows:

1. Intervenor is a non-profit corporation organized under the laws of the State of Nebraska, with offices located at 801 Lincoln Square, 121 South 13th Street, Lincoln, Nebraska 68508.

2. A majority of Intervenor's members hold certificates of public convenience and necessity as telephone common carriers providing intrastate telecommunications service, including local exchange services and non-switched digital transmission services, at various locations throughout the State of Nebraska.

3. The Applicant seeks authority to provide non-switched digital transmission services in and around Lincoln, Nebraska as a contract carrier.

4. Applicant is a political subdivision of the State of Nebraska.

5. Applicant does not possess the statutory authority, or any other legal authority or legal capacity, to provide for-hire telecommunications service as a contract carrier.

6. There are public policy considerations which should be addressed prior to the issuance of a contract carrier permit to the Applicant.

7. Interested parties must have an opportunity to provide their respective views before the Commission through the customary hearing process.

WHEREFORE, the Nebraska Telecommunications Association respectfully requests the Commission set this matter for oral hearing, that the Nebraska Telecommunications Association be designated as a Formal Intervenor in this proceeding pursuant to the rules of Commission procedure, and that, at the conclusion of such oral hearing, the Commission declare that the Applicant political subdivision lacks the legal authority to provide for-hire contract carrier telecommunications service.

DATED this 3rd day of November, 2000.

NEBRASKA TELECOMMUNICATIONS ASSOCIATION, Formal Intervenor

BY: HARDING, SHULTZ & DOWNS
and JACK L. SHULTZ – 15472
800 Lincoln Square
121 So. 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 434-3000

By: /s/ Jack L. Shultz
One of Intervenor's Attorneys

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In The Matter Of The Application Of Lincoln Electric System For Contract Carrier Permit Authority	))))))	Application No. C-2400 PROTEST OF NEBRASKA CABLE COMMUNICATIONS ASSOCIATION

COMES NOW, the Nebraska Cable Communications Association, pursuant to Neb. Admin. R. & Regs., Tit. 291, Ch. 1, §§ 005.07 and 014, and files this Protest to the Application Of Lincoln Electric System For Contract Carrier Permit Authority to provide competitive access transport services (i.e., point to point dark fiber service), and in support thereof states as follows.

A. Background.

On October 4, 2000, pursuant to Nebraska Revised Statutes Section 75-604, Lincoln Electric System ("LES") filed its Application Of Lincoln Electric System For Contract Carrier Permit Authority ("Application") to provide competitive access transport services (i.e., point to point dark fiber service). In Section II. A. of the Application, LES alleges it is an operating division of the City of Lincoln, Nebraska, a Nebraska municipal corporation and political subdivision of the State of Nebraska, organized and existing pursuant to its home rule charter.

Contrary to the assertion in the Section I. of the Application, the Nebraska Public Service Commission ("Commission") currently has no substantive rules and regulations in place governing the issuance of a contract

carrier permit pursuant to Nebraska Revised Statutes Section 75-604. The rules and regulations cited by LES apply only to common carriers. Further, pursuant to Nebraska Revised Statutes Section 75-604 and *Nebraska Public Service Commission v. NPPD*, 256 Neb. 479, 489-90, 590 N.W.2d. 840, 847-848 (1999), a contract carrier in Nebraska cannot be constitutionally required to meet the same standards as a common carrier.

A notice regarding the Application was published in the *Daily Record* on October 5, 2000. Accordingly, pursuant Neb. Admin. R. & Regs., Tit. 291, Ch. 1, §§ 014.01 & 015.01, any interested person had until November 6, 2000 (the actual deadline of November 4, 2000, falling on a Saturday, thus making the deadline Monday, November 6, 2000, pursuant to Neb. Admin. R. & Regs., Tit. 291, Ch. 1, § 010.02), to file protest against the granting of the Application and/or a petition of formal intervention in the Application.

B. <u>Commission Requirement For Protest.</u>

Pursuant to Neb. Admin. R. & Regs., Tit. 291, Ch. 1, §§ 005.07, 014.01 & 14.02, a protest must:

(1) Be filed with the Commission within thirty (30) days from the date of the publication of the notice regarding the (amended) application;

(2) Contain the name and address of the protestant;

(3) State the interest of the protestant in the proceeding/contain a statement concerning the interest of the protestant in the application protested;

(4) Set forth specifically the grounds upon which the protest is made;

(5) Specify the facts and circumstances relied upon; and

(6) Contain a request for the relief sought by the protestant.

C. This Protest is Timely Filed.

As set out above, the deadline for filing a protest against the granting of the Application and/or a petition of formal intervention in the Application is November 6, 2000. This Protest, filed November 3, 2000, is timely filed pursuant to Neb. Admin. R. & Regs., Tit. 291, Ch. 1, § 14.02.

D. Name and Address of Protestant.

The names of the protestant is Nebraska Cable Communications Association ("NCCA"), a Nebraska non-profit corporation. NCCA's address is 635 South 13th Street, Suite 315, Lincoln, Nebraska, 68508. NCCA's telephone number is 402/476-1177 and facsimile number is 402/476-4890.

E. Interest of the Protestant in the Proceeding/Statement Concerning the Interest of the Protestant in the Application Protested.

NCCA is a nonprofit corporation organized and existing pursuant to the laws of the State of Nebraska having the general power to promote and advance the operation and development of cable communications in

Nebraska and to provide information to political subdivisions and the general public related to the development and operation of cable communications in Nebraska.

The cable communications industry is interested in maintaining fair competition. Any sale or lease of dark fiber by a political subdivision, would amount to a public subsidy of a private enterprise, which could place a competitor at a disadvantage. Additionally, careful and serious legislative consideration should be given before captive municipal electric utility ratepayers are exposed to a risk of municipal utility's entry into a highly competitive business.

NCCA respectfully asserts that its interest and the interests of its members in this matter are separate and distinct and therefore cannot adequately be represented by any other party.

F. Specific Grounds Upon Which the Protest is Made/Facts and Circumstances Relied Upon.

On January 11, 2000, Commission determined that it lacked jurisdiction over the leasing of dark fiber by entities other than incumbent local exchange carriers. The Commission also found that the leasing of dark fiber alone, without more, is not a telecommunications service as defined by statute.

Of particular relevance to the Application is the fact that the Commission specifically found that the question of whether it is legal or appropriate for dark fiber to be offered for lease by political subdivision of the state "remains a fundamental policy question to be addressed by the Legislature or the courts". N.P.S.C. Order, January 11,

2000. For this reason, the Commission should deny the Application on the grounds that it lacks jurisdiction or abstain from any ruling until the matter can be addressed legislatively or in the courts.[1]

In the event that the Commission considers the Application on its merits, without waiving its position on the Commission's jurisdiction, the NCCA requests that the Application be denied.

A municipality or a political subdivision possesses, and can exercise, the following powers and no others; first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those indispensable to the purpose of the municipality not simply convenient, but indispensable." *Professional Firefighters of Omaha, Local 385 v. City of Omaha*, 243 Neb. 166, 174, 498 N.W.2d 325 (1993). "Statutes granting powers to municipalities are to be strictly construed, and where doubt exists, such doubt must be resolved against the grant. *L.J. Vontz Const. Co., Inc. v. City of Alliance*, 243 Neb. 334, 340-41, 500 N.W.2d 173 (1993). Lincoln Electric System ("LES") is a municipally

[1] There is also a procedural impediment to the Commission's consideration for the LES Application. LES has requested that the Commission approve the Application pursuant to Neb. Admin R. & Regs., Tit. 291, Ch. 5, § 002.49, et seq. These rules, however, apply only to common carriers, not contract carriers, and pursuant to *Nebraska Public Service Commission v. NPPD*, 256 Neb. 479, 489-90, 590 N.W.2d 840, 847-848 (1999), a contract carrier in Nebraska cannot be constitutionally required to meet the same standards as a common carrier. Given the Commission's current lack of substantive rules and regulations governing the issuance of a contract carrier permits, the Commission currently has no standard by which to judge the LES Application, or any other contract carrier permit application.

owned public utility that is owned and operated by the City of Lincoln, a Nebraska political subdivision and city of the primary class. LES is managed by the Lincoln Electric System Administrative Board ("Board"). The Board is appointed by the Mayor of the City of Lincoln. Generally, the ordinances creating the Board vest it with the power and authority to have "general control of the Lincoln Electric System including the responsibility for the control and management of the property, personnel, facilities, equipment, and finances. Lincoln Municipal Code §4.24.060. Further, subject to city council approval, the Board has the power and authority to enter into contracts for the purchase of capital assets. Lincoln Municipal Code § 4.24.070.

The City of Lincoln possesses only the power and authority that is granted by the Nebraska Constitution and/or state statutes. As municipal creation, LES, as exercised by the Board, has only the power and authority that is granted to it by the City of Lincoln, Any grant of power by the City of Lincoln to the Board must be within the power and authority granted to the City of Lincoln by the State.

The State of Nebraska has not granted to the City of Lincoln the power or authority to engage in the sale, lease or provisioning of dark fiber. Therefore, there can be no delegation from the City of Lincoln to LES to engage in such an enterprise. The provisioning of dark fiber in this state, potentially in competition with the cable communication companies and other businesses constitutes an unnecessary and unwanted intrusion of the public sector into private enterprise. Since the Legislature has not seen fit to confer such power and authority on the City of

Lincoln or LES, directly or indirectly, the Application should be denied.

For these reasons, as NCCA will develop more fully in evidentiary hearings, the Commission must reject the Application.

G. Request for Relief.

For the reasons set out above, the Commission should reject the Application in its entirety. NCCA respectfully requests that the Commission set a formal evidentiary hearing(s) to be conducted pursuant to Neb. Admin. R. & Regs., Tit. 291; Ch. 1, §§ 016 & 018 to address this protest and the Application, and that such hearing date(s) be set sufficiently in advance to allow the parties to complete the discovery permitted by Neb. Admin. R. & Regs., Tit. 291, Ch. 1, § 016.11. NCCA also requests an oral argument upon conclusion of the hearing(s) and the opportunity to submit post-hearing briefs.[2]

WHEREFORE, NCCA, for the foregoing reasons, respectfully requests that the Commission reject the Application and schedule hearings in this docket as set out above.

---

[2] In the unlikely event that NCCA is denied its right to protest the Application, NCCA respectfully requests status as a formal intervenor in this proceeding pursuant to Neb. Admin. R. & Regs., Tit. 291, Ch. 1, § 015.01, in that this pleading satisfies all the filing requirements of § 015.01.

DATED this 3rd day of November, 2000.

Nebraska Cable Communications Association, a Nebraska non-profit corporation,

By: /s/ J. Scott Paul
J. Scott Paul (#16635)
Thomas J. Kelley (#19754)
McGRATH, NORTH, MULLIN & KRATZ, P.C.
Suite 1400, One Central Park Plaza
222 South 15th Street
Omaha, Nebraska 68102
402/341-3070
402/341-0216 (Fax)

COUNSEL FOR NEBRASKA CABLE COMMUNICATIONS ASSOCIATION

VERIFICATION

I, Mary M. Campbell, hereby declare that I am the Executive Director of the Nebraska Cable Communications Association, that I am authorized to make this verification; that the foregoing document was prepared at the direction of Nebraska Cable Communications Association; and that the facts stated therein are true and correct to best of my knowledge information and belief.

/s/ Mary M. Campbell
Mary M. Campbell

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the following persons by certified United States Mail, return receipt requested, postage prepaid, on this 3rd day of November, 2000:

Applicant:
Mark J. Ayotte (#166315)
2200 First National Bank Building
332 Minnesota Street
St. Paul, Minnesota 55101
651/223-6600

Douglas L. Curry
General Counsel
Lincoln Electric Counsel
1040 "O" Street
P.O. Box 80869
Lincoln, Nebraska 68501-0869
402/473-3200

Attorneys For Lincoln Electric System

For Intervenors:

Jon C. Bruning (#20351)
1079 North 204th Avenue
Elkhorn, Nebraska 68022
402/289-1668
402/289-3140 (Fax)

Attorney For Cox Nebraska Telecom, L.L.C.

For Protestants:

None.

/s/ J. Scott Paul

BEFORE THE
NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application of Lincoln Electric System for Contract Carrier Permit Authority.	) Application No. C-2400)))

MOTION FOR DECLARATORY RULING

The Nebraska Telecommunications Association, hereinafter referred to as Intervenor, pursuant to Rule 019 of the Rules of Commission Procedure, respectfully moves the Commission for a Declaratory Ruling in the above-entitled matter. In support of this Motion, Intervenor respectfully states as follows:

1. Intervenor is anon-profit corporation organized under the laws of the State of Nebraska, with offices located at 801 Lincoln Square, 121 So. 13th Street, Lincoln, Nebraska 68508.

2. A majority of the Intervenor's members hold certificates of public convenience and necessity as telephone common carriers providing intrastate telecommunications service, including local exchange service and non-switched digital transmission services, at various locations throughout the State of Nebraska.

3. Applicant seeks authority to provide non-switched digital transmission services in and around Lincoln, Nebraska as a contract carrier.

4. Applicant is a political subdivision of the State of Nebraska.

5. Applicant asserts in its application that it possesses statutory authority to provide for-hire telecommunications services pursuant to "NEB. REV. STAT. § 15-201(b)" [sic].

6. Applicant asserts in its application that its Charter authorizes it to provide for-hire telecommunications service.

7. Applicant possess no specific authority, nor any implied authority pursuant to any specific grant of authority from the Legislature to perform for-hire telecommunications services. Absent such authorization, Applicant cannot engage in or receive a permit to provide for-hire telecommunications services.

8. The determination of whether Applicant possesses the requisite legal authority to perform for-hire telecommunications services presents a question of statewide commercial importance.

9. Intervenor requests oral argument on its Motion for Declaratory Ruling.

WHEREFORE, Intervenor respectfully requests that the Commission enter an order pursuant to this Motion finding that the Applicant is not authorized to offer for-hire telecommunications services or to hold a contract carrier permit to perform such services, because it lacks the required specific legal authority.

DATED this 9th day of November, 2000.

Respectfully submitted,

NEBRASKA TELECOMMUNICATIONS ASSOCIATION,
Intervenor

BY: HARDING, SHULTZ & DOWNS
and JACK L. SHULTZ – 15472
800 Lincoln Square,
121 So. 13th Street
P.O. Box 82028
Lincoln, Nebraska 68501-2028
(402) 434-3000

BY: /s/ Jack L. Shultz
Intervenor's Attorneys

IN THE SUPREME COURT OF NEBRASKA

IN THE MATTER OF	)	Case No. S-01-0286
THE APPLICATION OF	)	APPELLANT'S OBJECTIONS
LINCOLN ELECTRIC	)	TO NEBRASKA
SYSTEM SEEKING	)	TELECOMMUNICATIONS
CONTRACT CARRIER	)	ASSOCIATION'S MOTION
PERMIT AUTHORITY.	)	FOR SUMMARY DISMISSAL

The Appellant, City of Lincoln, d/b/a Lincoln Electric System, objects to Nebraska Telecommunications Association's (NTA) Motion for Summary Dismissal for the following reasons:

1. The NTA has based its Motion for Summary Dismissal on a lack of jurisdiction, alleging that the issues raised by LES have been rendered moot by the enactment of LB 827. However, whether an appellate court should pass on the merits of a case that becomes moot is, to a great extent, discretionary, even if LB 827 did render the issues raised in this appeal moot. In any event, LES contends that the general rule against appellate courts giving opinions on moot questions should not apply in the instant case because it involves a matter of public interest relating to the home rule charter authority of municipalities in Nebraska.

2. There is a serious question as to the constitutionality of LB 827 under the Supremacy Clause of the United States Constitution because it is in direct conflict with a plain reading of section 253(a) of the Telecommunications Act of 1996. The United States Court of Appeals for the Eighth Circuit is currently considering the preemptive effect of the referenced federal law in a similar case styled *Missouri Municipal League et al. v. FCC*, Case No. 01-1379.

3. The applicability of LB 827 is not a question considered by the Nebraska Public Service Commission below and is not presented by the record before the Court.

WHEREFORE, LES respectfully requests that the Court overrule NTA's Motion for Summary Dismissal.

Dated this 10th day of September, 2001.

CITY OF LINCOLN,
d/b/a/ Lincoln Electric
System, Appellant,

By: /s/ William F. Austin
William F. Austin, #10140
ERICKSON & SEDERSTROM, P.C.
301 South 13th Street,
Suite 400
Lincoln, NE 68508
(402) 476-1000

(2) (2)

Nos. 02-1591, 02-1599

Supreme Court, U.S.
FILED
MAY 2 3 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

NEBRASKA TELECOMMUNICATIONS ASSOCIATION, *et al.*,

Petitioners,

v.

CITY OF LINCOLN, NEBRASKA, d/b/a LINCOLN ELECTRIC SYSTEM,

Respondent.

NEBRASKA PUBLIC SERVICE COMMISSION,

Petitioner,

v.

LINCOLN ELECTRIC SYSTEM,

Respondent.

On Petitions For Writ Of Certiorari To The Nebraska Supreme Court

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

DOUGLAS L. CURRY
LINCOLN ELECTRIC SYSTEM
1040 O Street
Lincoln, NE 68508

WILLIAM F. AUSTIN
ERICKSON & SEDERSTROM
301 South 13th Street
Suite 400
Lincoln, NE 68508

SCOTT GREGORY KNUDSON
Counsel of Record
MARK J. AYOTTE
KEVIN M. DECKER
BRIGGS AND MORGAN, P.A.
2200 First National Bank Building
332 Minnesota Street
Saint Paul, MN 55101
651-808-6600

Attorneys for Respondents City of Lincoln and Lincoln Electric System

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the decision of the Nebraska Supreme Court rests on an independent and adequate state law ground, to wit, Respondent City of Lincoln had not properly delegated authority to its operating division, Respondent Lincoln Electric System, to apply for permission to offer telecommunications services as a contract carrier within its existing service area.

PARTIES TO THE PROCEEDINGS

Respondent City of Lincoln (02-1591) is a Nebraska home rule charter city. Respondent Lincoln Electric System (02-1599) is an operating division of the City of Lincoln. Petitioners Nebraska Telecommunications Association and Nebraska Cable Communications Association (02-1591) are Nebraska nonprofit corporations. Petitioner Nebraska Public Service Commission (02-1599) is an agency of the State of Nebraska.

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OPINIONS BELOW

The decision of the Nebraska Supreme Court is captioned *In re Application of Lincoln Electric System* and is reported at 265 Neb. 70, 655 N.W.2d 363 (2003). In two unreported orders the Nebraska Supreme Court denied Petitioners' motions for rehearing and to stay issuance of the mandate. The decision of the Nebraska Public Service Commission in this proceeding is also unreported. These three unreported decisions are reproduced in the appendices of both petitions.

JURISDICTION

Petitioners timely invoked jurisdiction of this Court under 27 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . , shall be the supreme Law of the Land . . . .

47 U.S.C. § 253(a) (2000):

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Neb. Rev. Stat. § 86-128(1)(b) (Supp. 2002):

> The commission may only issue a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier after due notice and hearing pursuant to commission rules and regulations. The commission shall not issue a certificate or a permit to any agency or political subdivision of the state.

Neb. Rev. Stat. § 86-575(2) (Supp. 2002):

> No agency or political subdivision of the state shall provide telecommunications services for a fee, except as authorized in sections 79-1319, 81-1120.01 to 81-1120.28, 85-401 to 85-418, and 85-1501 to 85-1542, or be issued a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier. Any agency or political subdivision which sells or leases its dark fiber pursuant to sections 86-574 to 86-578 shall not be deemed to be providing telecommunications services for a fee.

RESPONDENTS' STATEMENT OF THE CASE

This case arises against the backdrop of the Telecommunications Act of 1996, Pub. Law 104-104, 110 Stat. 56, which was intended to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers. . . ." H.R. Rep. No. 104-204 at 47 (1996), *reprinted in* 1996 U.S.C.C.A.N. 11. As this Court has observed,

the Telecommunications Act of 1996 "fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition, and incumbent LECs [local exchange carriers] are subject to a host of duties intended to facilitate market entry." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). What the City of Lincoln has sought to do in these proceedings is precisely what Congress intended in the Telecommunications Act of 1996 – to expand the competitive telecommunications offerings available to consumers within its market area. To date, the City has been unsuccessful, not because of federal law, but because of an unduly restrictive interpretation of its municipal powers under Nebraska law.

The City of Lincoln's Home Rule Charter Provides the City with a Broad Grant of Power

Under Article XI, § 2 of the Nebraska Constitution, cities with a population over 5,000 may adopt a charter for their municipal governments. The City of Lincoln is one of two cities in Nebraska which has adopted a home rule charter.[1] As the Nebraska Supreme Court has explained:

> The purpose of the home rule charter provision of the Constitution was to render the cities adopting such charter provisions as nearly independent of state legislation as was possible. Under it a city may provide for the exercise of every power connected with the proper and efficient government of the municipality where the legislature has not entered the field.

[1] The other is Omaha.

Axberg v. City of Lincoln, 141 Neb. 55, 58, 2 N.W.2d 613, 614-15 (1942). The only limit on a home rule charter is that the City remains subject to the constitution and laws of the State of Nebraska.

In 1992, the City of Lincoln amended its home rule charter to change it to a "limitation of power" model of charter from a "grant of power" model. The Lincoln City Charter now provides:

> The City of Lincoln shall have the right and power to exercise all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever that it is possible for it to have at the present and in the future under the Constitution of the State of Nebraska, except as prohibited by the State Constitution or restricted by this Charter, and to exercise any powers which may be implied thereby, incidental thereto, or appropriate to the exercise of such powers. The City shall also have the right and power to exercise all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever that now are, or hereafter may be, granted by the laws of the State of Nebraska to all cities and villages or applicable to cities of the primary class, provided that such laws are not inconsistent with this Charter.

City of Lincoln Charter, Art. II, Sec. 1.

The "limitation of power" model the City of Lincoln adopted conformed to the distinction the Nebraska Supreme Court made in *Standard Oil Co. v. City of Lincoln*, 114 Neb. 243, 207 N.W. 172 (1926), *aff'd*, 275 U.S. 504 (1927). In that decision, the court described the differences between the limitation and grant of powers models of charters:

> It is within the competency of the electorate of a city to adopt a charter in any form it may deem proper within the limits specified in the Constitution; it may take the form of a grant or a limitation of powers; in the former case all powers not expressly or impliedly granted to the city government are reserved to the people; in the latter all powers are granted to the city government except those expressly or impliedly withheld.

Id. at 248, 207 N.W. at 174 (quotation omitted). With the 1992 charter amendments, the City of Lincoln obtained the right to exercise *all* municipal powers available to it under Nebraska law. It was under this expanded authority that the City of Lincoln, through its Lincoln Electric System ("LES"), sought to increase its service offerings to customers in its market area.

Proceedings Before the Nebraska Public Service Commission

In October 2000, LES filed an application requesting a permit from the Nebraska Public Service Commission ("NPSC"), asking NPSC to authorize LES to provide telecommunications services for hire. An operating division of the City of Lincoln, LES is a municipal utility that provides electric service to customers within a 190-square mile area in and around Lincoln. Its existing network of transmission lines had unused fiber optic capacity, and LES sought permission to put that capacity to productive use as a telecommunications contract carrier.

Petitioner Nebraska Telecommunications Association ("NTA") was one of the 30 intervenors in the LES proceeding. (*See* Petition in 02-1591 at A-25-26.) Petitioner NTA then moved for a declaration that LES did not have

express or implied authority under either state law or the Lincoln City Charter to provide for-hire telecommunications services.

NPSC agreed with the NTA on both grounds and dismissed LES' application to provide telecommunications services for hire. The agency held that no state statute authorized LES to provide telecommunications services for hire. NPSC also reached the same conclusion regarding the Lincoln City Charter, finding no express grant of power to LES "to engage in the for-hire telecommunications business." (*See* Petition in 02-1591 at A-34.) One member of NPSC concurred in the result, finding that while the Lincoln City Charter permitted the City to offer for-hire telecommunications services, the Lincoln City Council had not properly delegated that authority to LES. (*See* Petition in 02-1591 at A-48, A-51.)

Decision of the Nebraska Supreme Court

LES appealed the agency's decision to the Nebraska Supreme Court. While LES' appeal was pending, the Nebraska Legislature addressed the statutory vacuum NPSC said existed in state law. Bowing to intense lobbying from the private telecommunications industry, the legislature enacted 2001 Neb. Laws, L.B. 827. This act provided that NPSC "shall not issue . . . a permit . . . to an agency or political subdivision of the state," nor shall any "agency or political subdivision of the state . . . provide telecommunications services for a fee . . . or be issued . . . a permit as a telecommunications contract carrier."[2] Petitioner NTA,

[2] These provisions are currently codified at Neb. Rev. Stat. § 86-128(1)(b) and § 86-575(2) (Supp. 2002). For convenience, the provisions

(Continued on following page)

appellee below, moved to dismiss LES' appeal based on the prohibitions that L.B. 827 imposed. LES opposed NTA's motion on the ground L.B. 827 was preempted by the Telecommunications Act of 1996, 47 U.S.C. § 253(a) (2000). Though LES duly notified the Nebraska Attorney General of its constitutional challenge to L.B. 827, the Attorney General neither entered an appearance nor filed a brief in the Nebraska Supreme Court. *In re Application of Lincoln Elec. Sys.*, 265 Neb. 70, 74-75, 655 N.W.2d 363, 368 (2003).

The Nebraska Supreme Court affirmed NPSC's decision to dismiss LES' application. The state supreme court premised its affirmance on its interpretation of state municipal law. To reach that conclusion, however, the court first had to address LES' preemption challenge to the recently enacted statutory prohibition against municipal telecommunications services found in L.B. 827. Its preemption analysis was reasoned and thorough. The court discussed the import to this case of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which held that where Congress intends to change the balance between the federal government and the states, Congress must make its intent "'unmistakenly clear.'" 265 Neb. at 77, 655 N.W.2d at 370. The court then reviewed in detail the reasoning of the principal decisions that addressed the preemptive effect of 47 U.S.C. § 253(a). Having a "concurrent duty to enforce federal law," the court concluded that based on the rule of statutory construction set out in *Salinas v. United States*, 522 U.S. 52 (1997), "Congress' use of the phrase 'any entity' in § 253(a) is indicative of an

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at issue here will be referred to by their legislative bill number "L.B. 827."

expansive scope which includes a governmental entity, such as a municipally-owned utility, seeking to provide telecommunications services." *Id.* at 79, 80, 655 N.W.2d at 371, 372. Because L.B. 827 did not fall within the safe harbors provided by 47 U.S.C. §§ 253(b) or (c), the court held that federal law preempted L.B. 827. *Id.* at 80, 655 N.W.2d at 372.[3]

The court's preemption holding was only the first part of its disposition of LES' appeal. Although LES prevailed on the preemption issue, LES still had to establish its authority under state municipal law to offer telecommunications services on a for-hire basis. On this point the Nebraska Supreme Court ultimately agreed with NPSC.

The municipal law question centered first on what powers the Lincoln City Charter conferred on LES to offer telecommunications services for hire. Petitioners argued to the supreme court that a legislative grant of municipal power must be interpreted under the doctrine of strict construction known as Dillon's Rule.[4] While that rule may have once applied to the Lincoln City Charter, the court believed the 1992 revisions to the Lincoln City Charter took it outside the strict construction Dillon's Rule would impose. *Id.* at 83, 655 N.W.2d at 374. Instead, the question was whether the broad authorization of powers found in the Lincoln City Charter included the authority for the

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[3] There are three petitions for certiorari (02-1238, 02-1386 and 02-1405) pending for review of the ruling of the Eighth Circuit Court of Appeals in *Missouri Municipal League v. F.C.C.*, 299 F.3d 949 (8th Cir. 2002).

[4] The doctrine is named after legal scholar and jurist John F. Dillon. *See* 2A Eugene McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 10.09 at n.6 (3d ed.)

City to provide telecommunications services for hire. Following its prior precedent in *Standard Oil Co. v. City of Lincoln*, 114 Neb. 243, 207 N.W. 172 (1926), *aff'd*, 275 U.S. 504 (1927), in which the City of Lincoln was held authorized to sell gasoline and oil, the court concluded that providing telecommunications services for hire served a sufficiently public purpose to be within the City of Lincoln's municipal powers. 265 Neb. at 86-87, 655 N.W.2d at 375-76.

Nevertheless, while rejecting NPSC's interpretation of Nebraska municipal law governing the power of home rule charter cities, the Nebraska Supreme Court agreed with NPSC that the Lincoln City Council had failed legislatively to delegate its available authority to LES. Though LES had clear authorization to provide electrical service, the court saw nothing in the record to support a finding that provision of telecommunication services was "*necessary* to the efficient operation of the electric system." *Id.* at 88, 655 N.W.2d at 377 (emphasis in original). Thus, the Nebraska Supreme Court concluded, "the city of Lincoln has not, at this time, properly delegated authority to LES to utilize the excess fiber optic capacity for the provision of for-hire telecommunications services." Accordingly, the court affirmed the dismissal of LES' application. *Id.*, 655 N.W.2d at 377.

Following the ruling, Petitioner NTA moved for reconsideration and then to stay issuance of the court's mandate. NPSC, appearing for the first time through the Nebraska Attorney General, likewise moved to stay issuance of the mandate. Respondent objected to NPSC's request on the ground that, although NPSC was listed on the caption of the court's opinion as an appellee, NPSC was not certified as a party on LES' appeal and had merely functioned as the tribunal in the proceedings that LES

had appealed. *See* Appellant's Objection to Nebraska Public Service Commission Request to Stay Issuance of Mandate, dated February 22, 2003, at 1-2. Moreover, the Attorney General had not earlier seen fit to respond to LES' constitutional challenge to L.B. 827, despite receiving the required notice of LES' challenge.[5] The court denied without opinion NTA's motion for reconsideration, as well as the motion to stay issuance of the mandate that NTA and NPSC had filed. (*See* Petition in 02-1591 at A-57, Petition in 02-1599 at A-25, A-26.)

REASONS FOR DENYING THE WRIT

I. The Decision below Rests on an Adequate and Independent State Law Ground

The Nebraska Supreme Court reached three principal conclusions in its decision. First, the court held that 47 U.S.C. § 253(a) preempted L.B. 827. Second, the Lincoln City Charter authorized the City of Lincoln to provide telecommunications services for hire. But the Nebraska Supreme Court nevertheless affirmed NPSC because the court ruled that the Lincoln City Council had failed to

[5] Indeed, there is no provision in the state law governing appeals that authorizes NPSC to be a party in any appeal of its decision when, as here, it was acting as a neutral tribunal. In fact, Nebraska's Administrative Procedures Act, though not fully applicable, would suggest the contrary. Neb. Rev. Stat. § 84-917(2)(a) (Supp. 2002) ("if an agency's only role in a contested case is to act as a neutral fact finding body, the agency shall not be a party of record."); *cf. Karnes v. Wilkinson Mfg. Co.*, 220 Neb. 150, 152, 368 N.W.2d 788, 789 (1985) (Tax Commissioner was not a "person aggrieved" by decision of state board of equalization and hence lacked standing under 84-917 to appeal).

properly delegate authority to LES to use its excess fiber optic capacity to provide telecommunications services for hire.

When a state court decision rests on both federal and state law questions, this Court will defer reviewing the federal question if the state court's judgment rests on independent and adequate state law grounds. *Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). As stated in *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945):

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

This principle is also premised on this Court's respect for the independence of state courts. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). A straightforward application of this principle leaves no doubt that the decision below affirming the dismissal of LES' application rests on an adequate and independent state law ground.

The Nebraska Supreme Court was forced to address the preemption question because the legislature enacted L.B. 827 while LES' appeal was pending. Having resolved

the preemption question in LES' favor, however, the court then had to address the remaining state law questions. While the court rejected NPSC's interpretation of the City's home rule charter, it nevertheless affirmed the agency's decision to dismiss LES' application because of the absence of express city council authorization to LES to provide telecommunications services.

Though only a comparatively short part of its opinion, the court's reasoning on city council authorization is critical. While the court first stated that "LES is clearly authorized to provide electric service to citizens and businesses in Lincoln and the surrounding area," 265 Neb. at 88, 655 N.W.2d at 377, the court disagreed that LES was authorized to use its facilities to provide other services. Instead, the Nebraska Supreme Court reasoned: "However, use of LES' facilities or property for an entirely different purpose, i.e., the provision of for-hire telecommunications services, is not a use that can be fairly considered to be within the powers delegated to LES by the city." *Id.*, 655 N.W.2d at 377. Thus, the court concluded:

> The record does not reflect that the use of excess fiber optic capacity for the provision of for-hire telecommunications services is *necessary* to the efficient operation of the electric system. Therefore, the city of Lincoln has not, at this time, properly delegated authority to LES to utilize the excess fiber optic capacity for the provision of for-hire telecommunications services.

Id., 655 N.W.2d at 377 (emphasis in original).

The independence of the state court decision is beyond peradventure, as the Nebraska Supreme Court did not need to refer to federal law when analyzing the issue of

city council authorization to LES. Likewise, there is absolutely no implied reliance on federal law in the holding that LES lacked authorization from the Lincoln City Council to provide telecommunications services for hire. The court simply reasoned that the City's existing authorization to LES to provide electrical service was insufficient to authorize LES to provide for-hire telecommunications services.

There is also no dispute that the court's delegation ruling was adequate to support the judgment below. The court's affirmance of NPSC's dismissal of the LES application was final on that basis alone. Tellingly, Petitioners gloss over this aspect of the supreme court's decision, relegating it to a passing footnote reference. (*See* Petition in 02-1591 at 8 n.3; Petition in 02-1599 at 6 n.5.) Because the decision below is so plainly one resting on an independent and adequate state law ground, that reason alone compels denying the petitions.

II. The Nebraska Supreme Court Correctly Applied this Court's Preemption Precedents

To obtain review, Petitioners urge that 47 U.S.C. § 253(a) alters the constitutional balance between the states and the federal government if it is read to preempt state regulation of telecommunications activities by municipalities. Petitioners contend that courts must first apply the "plain statement rule" from *Gregory v. Ashcroft*, 501 U.S. 452 (1991), before concluding that section 253(a) does, in fact, preempt such state action. In enacting section 253(a), Petitioners claim that Congress failed to satisfy the *Gregory* decision, because Congress did not specifically note that municipalities fall within the broad

meaning of "any entity." Because section 253(a) expressly preempts conflicting state law – unless the safe harbors of sections 253(b) or (c) apply – the only dispute that Petitioners present under *Gregory* is whether "any entity" actually means all types of entities, or whether that provision must be read to exclude entities owned by cities or other political subdivisions of a state. By ignoring the fundamental precepts of *Gregory* and its progeny, Petitioners erroneously conclude that the Nebraska Supreme Court's decision was inconsistent with this Court's prior preemption decisions.

In *Gregory*, the Court addressed whether the federal Age Discrimination in Employment Act of 1967 (ADEA) prohibited the State of Missouri from imposing mandatory retirement on state judges based on age. *Id.* at 455. The Court recognized that enforcing the ADEA in favor of Missouri's constitutional officers imposed federal regulation on matters traditionally left to the states, but it did not doubt that the federal government could upset the usual constitutional balance of federal and state powers. *Id.* at 460. Rather, the Court merely found that federal involvement in a matter of traditional state concern is "a power that we must assume Congress does not exercise lightly." *Id.* As a result, the Court directed that courts "be certain of Congress' intent before finding that federal law overrides this balance." *Id.* (quotation omitted).

The Court reasoned in *Gregory* that a "plain statement rule" was necessary because "'[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Id.* at 461 (quoting *Will v. Michigan Dept. of State*

Police, 491 U.S. 58, 65 (1989)) (other quotation omitted). But *Gregory* did not establish a talismanic approach, as the Court itself characterized the rule as "nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* Applying this rule to the ADEA and appointed judges, the Court found that Congress' intent regarding enforcement of the ADEA in favor of the judges was "at least ambiguous," given that most other public officials were excluded from the ADEA's protection. *Id.* at 470. Consequently, the plain statement rule was not satisfied. *Id.* As the Court's analysis illustrates, the *Gregory* inquiry concerns only whether Congress' intent was clear.

More recently, the Court applied this rule to a federal statute worded similarly to section 253(a). In *Salinas v. United States*, 522 U.S. 52 (1997), the Court addressed whether a federal bribery statute, which by its terms applied to "any business transaction," actually applied only to bribes affecting federal funds. The Court rejected the defendant's attempt to narrow the obviously broad scope of the law, finding that "[t]he word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose a narrowing construction." *Id.* at 57 (citations omitted). The Court specifically noted that in applying the *Gregory* standard, a "statute can be unambiguous without addressing every interpretative theory offered by a party." *Id.* at 60. Thus, the Court held that the proper inquiry is simply whether it is "plain to anyone reading the Act that the statute encompasses the conduct at issue." *Id.* (citation omitted).

Applying this standard to the federal statute before it, the Court in *Salinas* concluded that "[t]he text of [the bribery statute] is unambiguous on the point under construction here" and thus "the plain-statement requirement articulated in *Gregory* . . . does not warrant a departure from the statute's terms." *Id.* As *Salinas* illustrates, this Court has found that the use of "any" as a modifier is sufficiently clear to satisfy the *Gregory* plain statement rule. *See also United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'").

The decision of the Nebraska Supreme Court is perfectly consistent with these precedents. On its face, *Gregory* supports the decision of the Nebraska Supreme Court. No ambiguity exists in section 253(a) that remotely resembles the ADEA provision addressed in *Gregory*. Section 253(a) makes no exceptions and creates no confusion as to its reach: "*No State or local statute or regulation*, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (2000) (emphasis added). An objective reading of this provision leaves no question that Congress intended to preempt *all* state regulation of entry into the telecommunications service industry by *any* entity. A narrower reading, such as that suggested by Petitioners, is contrary to the expansive language Congress used and would "press statutory construction to the point of disingenuous evasion [of] a constitutional question." *Salinas*, 522 U.S. at 60 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57 n.9 (1996)). The statute's plain text leaves no doubt that Congress intended to insert

the federal power into this traditional state concern and, thus, the Nebraska Supreme Court properly applied this Court's *Gregory* principle.

The *Salinas* decision confirms the Nebraska Supreme Court's proper adherence to this Court's precedent. As in *Salinas*, the Nebraska Supreme Court faced a federal statute in which Congress clearly sought the broadest reach possible by employing the modifier "any" before the word "entity." Petitioners attempt to obscure this clarity by arguing that Congress *could have* intended to exclude municipalities from the meaning of "any entity." But as illustrated in *Salinas*, the approach to statutory interpretation used in *Gregory* is not a license to create an ambiguity simply by raising *possible* varying interpretations of a federal statute.[6] *Salinas*, 522 U.S. at 60 ("[A statute] need only be plain to anyone reading the Act that the statute encompasses the conduct at issue.") (quotation omitted). Thus, in *Salinas* the Court found no ambiguity in Congress' command when it used the term "any" and, accordingly, concluded that the bribery statute did not offend the *Gregory* principle. It follows that the Nebraska Supreme Court properly found that the plain statement rule does not preclude Congress' clear intent to preempt state regulation in this area of traditional state governance.

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[6] Indeed, Petitioners' focus on creating an ambiguity in the particulars of section 253(a) is misplaced; the plain statement rule does not require congressional precision with respect to statutory details. *See Gregory*, 501 U.S. at 476 (White, J., concurring in part, dissenting in part, and concurring in the judgment) (observing that the Court historically applied the plain statement rule only to "whether Congress intended a particular statute to extend to the States *at all*") (emphasis added).

The Nebraska Supreme Court's decision is also consistent with decisions from the Eighth Circuit Court of Appeals and the Western District of West Virginia on this exact issue. In *Missouri Mun. League v. F.C.C.*, 299 F.3d 949 (8th Cir. 2002), various Missouri municipalities and public utilities mounted the same challenge as Petitioners do here – namely, that it is unclear whether Congress intended to include municipalities within the meaning of "any entity" in section 253(a). *Id.* at 953. The Eighth Circuit rejected this argument, holding that "[t]here is no doubt that municipalities and municipally owned utilities are entities under a standard definition of the term." *Id.* The court further found that "Congress's use of 'any' to modify 'entity' signifies its intention to include within the statute all things that could be considered as entities." *Id.* at 953-54. The court supported its conclusion with firm reliance on this Court's precedent. *Id.* (quoting *Gonzalez*, 520 U.S. at 5).

Likewise, the court in *City of Bristol v. Earley*, 145 F. Supp. 2d 741 (W.D.Va. 2001), rejected an attempt to contort the plain meaning of "any entity" in section 253(a). The court found "that the broad and unambiguous language of § 253(a) makes it clear that Congress did intend for cities to be 'entities' within the meaning of the Telecommunications Act." *Id.* at 747. And like the Eighth Circuit, the court concluded that "[s]uch an interpretation is confirmed by the use of the modifier 'any.'" *Id.* The court similarly relied on and applied this Court's precedents, holding "that the use of the modifier 'any' in a federal statute precludes a narrow interpretation of the law's application." *Id.* (citing *Salinas*, 522 U.S. at 57; *Gonzales*, 520 U.S. at 5). As a result, the court found that "it strains logic to interpret the term 'any entity' in § 253(a) to mean

'any entity except for municipalities and other political subdivisions of states.'" *Id.*

The contrary opinion in *City of Abilene v. F.C.C.*, 164 F.3d 49 (D.C. Cir. 1999), does not justify granting the petitions. This decision is an aberration, relying as it does on an ethereal, if not odd, notion of congressional *tone* of voice rather than this Court's clear precedents. *Id.* at 52-53. As noted in *City of Bristol*, notions of tone of voice have no role in statutory interpretation. 145 F. Supp. 2d at 749. Inflections of sincerity, concern, emphasis or even sarcasm simply are not part of the written record that comprises legislative history. The *City of Abilene* court also utterly failed to justify its decision on preemption with Congress' manifest pro-competitive interest in the Telecommunications Act of 1996. Moreover, the most recent decisions reviewing *City of Abilene* have uniformly rejected its reasoning, which suggests that further percolation in the lower courts will properly rectify any conflict in favor of this Court's precedents. *See, e.g.*, *Missouri Mun. League*, 299 F.3d at 954-55; *City of Bristol*, 145 F. Supp. 2d at 749; *In re Application of Lincoln Elec. Sys.*, 655 N.W.2d at 370-72.

Finally, the Court's decision in *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533 (2002), is inapposite. *Raygor* concerned whether 28 U.S.C. § 1367(d) tolled the statute of limitations for claims against non-consenting states that are subsequently dismissed on Eleventh Amendment grounds. *Id.* at 542. Section 1367(d) purported to apply to "any claim," but the Court expressed reservations over reading the statute with such an expansive scope in the absence of clearer congressional intent that it apply to states. *Id.* at 542-44. The Court ultimately found that Congress had not sufficiently expressed its clear intent to have section 1367 apply to the states for

purposes of abrogating their Eleventh Amendment immunity. *Id.* at 544-46.

Raygor is inapposite because there is no question that Congress intended that section 253 apply to the states – the statute in fact *limits* its reach to the states and local government. 47 U.S.C. § 253(a) (2000). Thus, the concerns in *Raygor* that Congress did not sufficiently express its intent to have the statute apply to the states cannot be present here. In short, no further review by this Court is warranted in this case. The Nebraska Supreme Court correctly followed *Gregory* and *Salinas* to enforce the balance between federal and state authority that Congress struck when enacting 47 U.S.C. § 253.

III. Petitioners' Asserted Conflict is Less than It Appears and Does Not Warrant Review of this Case in Any Respect

Petitioners assert that a clear conflict exists between this case and the decision of the District of Columbia Circuit in *City of Abilene*. It is true that the *Missouri Municipal League* and *City of Bristol* line up with this case in opposition to *City of Abilene* and two state cases, one from Iowa and one from Georgia. But this conflict is less than Petitioners urge, and if the lower courts are allowed to address this issue further, is likely to be of limited significance. The Iowa decision, *Iowa Telephone Ass'n v. City of Hawarden*, 589 N.W.2d 245 (Iowa 1999), followed close on the *City of Abilene* decision and merely parroted that decision. *Id.* at 252. Significantly, the Iowa Supreme Court did not need to seriously analyze the import of 47 U.S.C. § 253(a), as it held the state statute preempted under another provision of the Telecommunications Act of 1996. *Id.* at 253-54. The Georgia case, *Municipal Elec. Auth. of*

Georgia v. Georgia Pub. Serv. Comm'n, 241 Ga. App. 237, 525 S.E.2d 399 (1999), similarly failed to undertake any meaningful analysis of the preemption question. *See id.* at 241, 525 S.E.2d at 403. Moreover, any administrative issues the FCC may encounter while this difference works out can be resolved by the FCC rejecting the *City of Abilene* decision. Indeed, because the FCC concedes that provisions like L.B. 827 conflict with the congressional purpose in the 1996 legislation, *see In re Missouri Mun. League*, 16 F.C.C.R. 1157, 1163 (2001), it is surprising to see that the FCC is petitioning this Court.[7] *See also In re Enforcement of Section 275(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Against Ameritec Corporation*, 13 F.C.C.R. 19046, 1998 WL 658606 (F.C.C.) ¶ 10, ¶ 16 (1998) (term "entity" should be interpreted broadly to achieve pro-competitive intent of Congress in passing Telecommunications Act of 1996).

In any event, the decision below is far more limited than Petitioners claim. As it came out of the Nebraska Public Service Commission, this case turned simply on the question of whether the home rule charter under which the City of Lincoln operates conferred upon it sufficient power in its own right to seek a contract carrier permit without further state authorization. The Nebraska Supreme Court, having found that the Lincoln City Charter

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[7] Indeed, the FCC's position is that under § 253(a), a state law cannot prevent an independent corporate entity – even though wholly owned by a city or other political subdivision of a state – from offering telecommunications services for hire. 16 F.C.C.R. 1169, ¶ 20. Thus, the position the FCC takes on preemption under § 253(a) depends on the form of the entity a municipality chooses, a position that hardly reflects the federalism concerns expressed in *Gregory*.

was, in fact, a limitations of power charter, concluded that Dillon's Rule, a rule of strict construction, did not apply to it. 265 Neb. at 83, 655 N.W.2d at 374. The broad authorizing language contained in the City charter was, therefore, sufficient to support the application for contract carrier permit authority. Thus, the intervening adoption of L.B. 827 by the Nebraska Legislature was a clear and unequivocal attempt to prohibit an otherwise authorized entity from engaging in the field of telecommunications. It was this prohibitory language of L.B. 827 that was found to be preempted by federal law and thus unconstitutional.

Nor is there cause to hold this case pending review of *Missouri Municipal League*, should this Court grant the FCC's petition for certiorari in 02-1386. The Nebraska Supreme Court may have held L.B. 827 preempted, but the court affirmed NPSC, which had dismissed LES' application as lacking support under state municipal law. Even if this Court reverses the Eighth Circuit decision in *Missouri Municipal League*, the judgment below will be unaffected. If this Court were to reverse the Eighth Circuit, the Nebraska Supreme Court should be allowed to undo its preemption holding in the context of a real, live controversy. Thus, any decision on preemption by the Nebraska Supreme Court in *this* proceeding following a reversal of the Eighth Circuit would be purely advisory.

CONCLUSION

Because the decision below rests on an adequate and independent state ground, the Petitions in 02-1591 and 02-1599 should be denied. Even on the merits, the asserted conflict does not merit review, regardless of whether the issue is reviewed in *Missouri Municipal League*.

Respectfully submitted,

DOUGLAS L. CURRY
LINCOLN ELECTRIC SYSTEM
1040 O Street
Lincoln, NE 68501

WILLIAM F. AUSTIN
ERICKSON & SEDERSTROM
301 South 13th Street
Suite 400
Lincoln, NE 68508

SCOTT GREGORY KNUDSON
Counsel of Record
MARK J. AYOTTE
KEVIN M. DECKER
BRIGGS AND MORGAN, P.A.
2200 First National
Bank Building
332 Minnesota Street
Saint Paul, MN 55101
651-808-6600

Attorneys for Respondents
City of Lincoln and
Lincoln Electric System

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No. 02-1591

IN THE

Supreme Court of the United States

NEBRASKA TELECOMMUNICATIONS ASSOCIATION AND NEBRASKA CABLE COMMUNICATIONS ASSOCIATION,

Petitioners,

v.

CITY OF LINCOLN, NEBRASKA, d/b/a LINCOLN ELECTRIC SYSTEM,

Respondent.

On Petition For Writ of Certiorari To The Nebraska Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE, NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION, ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES AND UNITED STATES TELECOM ASSOCIATION IN SUPPORT OF PETITIONERS

DONNA N. LAMPERT
Counsel of Record

Mark J. O'Connor
Linda L. Kent
Lampert & O'Connor
1750 K Street, NW
Suite 600
Washington, D.C. 20006
(202) 887-6230

[Additional Amici Inside Cover]

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David Zesiger
Independent Telephone and Telecommunications Alliance
1300 Connecticut Avenue, NW, Suite 600
Washington, D.C. 20036
(202) 775-8116
Counsel for the Independent Telephone and Telecommunications Alliance

L. Marie Guillory
Alexia D. Bowie Ransom
National Telecommunications Cooperative Association
4121 Wilson Boulevard-10th Floor
Arlington, VA 22203
(703) 351-2000
Counsel for the National Telecommunications Cooperative Association

Organization for the Promotion and Advancement
of Small Telecommunications Companies
21 Dupont Circle, NW, Suite 700
Washington, D.C. 20036
(202) 659-5990

Lawrence E. Sarjeant
Indra Sehdev Chalk
Michael T. McMenamin
Robin Tuttle
United States Telecom Association
1401 H Street, NW, Suite 600
Washington, D.C. 20005
(202) 326-7300
Counsel for the United States Telecom Association

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the Independent Telephone and Telecommunications Alliance, the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies and the United States Telecom Association ("the Associations"), hereby move to file a brief as *amici curiae*. The motion is requested because respondent City of Lincoln, Nebraska, d/b/a Lincoln Electric System, refuses to grant written consent to file an *amici* brief. Petitioners Nebraska Telecommunications Association and Nebraska Cable Communications Association provided written consent.

The Associations are uniquely positioned to provide a national perspective on the need for certainty regarding the issue in this case: the meaning and scope of Section 253 of the Communications Act of 1934, as amended. There are compelling legal, policy and market reasons discussed by the Associations in the accompanying brief for resolving the current conflict that exists among the circuits on this issue. The privately-owned telecommunications companies represented by the Associations have a strong interest in the resolution of the conflict regarding whether state policy determinations concerning the provision of telecommunications services by state political subdivisions have been preempted by the federal government so that these companies may plan for and make necessary business and investment decisions.

The decision below, which upholds federal preemption of state authority over its political subdivisions, is at odds with U.S. appellate and state court decisions and creates substantial uncertainty in the telecommunications industry. The Associations are deeply concerned that the decision

below has impeded the ability of state legislatures to exercise state sovereignty over these matters. The Associations believe that the provision of telecommunications services by the political subdivisions of a state presents unique issues and states should be free to impose restraints on their political subdivisions where they believe doing so would constitute sound public policy that is consistent with federal and state law.

For these reasons, and those discussed in the attached brief, the Associations respectfully request leave to file a brief *amici curiae*.

Respectfully submitted,

Donna N. Lampert
Counsel of Record

Mark J. O'Connor
Linda L. Kent
Lampert & O'Connor
1750 K Street, NW
Suite 600
Washington, D.C.
20006
(202) 887-6230

David Zesiger
Independent Telephone and
Telecommunications Alliance
1300 Connecticut Ave., NW
Suite 600
Washington, D.C. 20036
(202) 775-8116
Counsel for the Independent Telephone and Telecommunications Alliance

L. Marie Guillory
Alexia D. Bowie Ransom
National Telecommunications
Cooperative Association
4121 Wilson Blvd, 10th Floor
Arlington, VA 22203
(703) 351- 2000
Counsel for the National Telecommunications Cooperative Association

Organization for the
Promotion and
Advancement of Small
Telecommunications
Companies
21 Dupont Circle, NW
Washington, D.C. 20036
(202) 659-5990

Lawrence E. Sarjeant
Indra Sehdev Chalk
Michael T. McMenamin
Robin Tuttle
United States Telecom Association
1401 H Street, NW, Suite 600
Washington, D.C. 20005
(202) 326-7300
Counsel for the United States Telecom Association

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INTEREST OF THE *AMICI CURIAE*

Amici Independent Telephone and Telecommunications Alliance ("ITTA"), National Telecommunications Cooperative Association ("NTCA"), Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") and United States Telecom Association ("USTA") are national trade associations representing local telephone companies operating in Nebraska and throughout the country.[1] ITTA was organized in 1994 and represents 13 midsize local exchange carriers that collectively serve approximately ten million access lines in forty states, including two local exchange carriers in Nebraska. NTCA, established in 1954, is an association of 560 rural telecommunications providers that serve the more sparsely populated, remote and rural areas of the United States, including 24 telecommunications providers in Nebraska. OPASTCO, established in 1963, represents more than 500 small, independently owned local exchange carriers primarily serving rural areas of the United States and Canada, including 21 local exchange carriers in Nebraska. Founded more than a century ago, USTA represents some 600 facilities-based incumbent wireline providers of local telephone service which operate more than eighty percent of the country's local access lines, including 17 incumbent wireline providers in Nebraska.

The member companies of the *amici curiae* Associations are subject to the provisions of the Communications Act of 1934, as amended, ("Communications Act"), 47 U.S.C. §§ 151 et. seq., and are regulated by both state and federal regulatory authorities. The business and investment decisions of these companies are directly affected by the

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[1] No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the *amici* and their counsel, made a monetary contribution to this brief's preparation and submission.

states' ability to control the entry of their own political subdivisions into the telecommunications service market at issue in this case. These companies seek intervention by this Court to provide certainty as to the meaning and scope of Section 253 of the Communications Act, as amended, 47 U.S.C. §253.

SUMMARY OF ARGUMENT

The scope of authority conferred upon local political subdivisions within a state is one of the most critical determinations of state sovereignty made by the elected representatives of the states. Specific to telecommunications, the state legislative decision to allow or not to allow the political subdivisions of a state to provide telecommunications services directly impacts state economies, state revenues and taxes, and both public and private telecommunications infrastructure investment decisions. Case law extends great deference to such state judgments. *See Gregory v. Ashcroft,* 501 U.S. 452 (1991). Only when Congress expresses a clear intent to preempt such state judgments has this Court reversed the norm and required state policy determinations to give way to contrary federal policy decisions. Taken as a whole, Section 253 does not provide the clear and manifest congressional intent necessary to deprive the states of the authority to make such important determinations.

There is, however, an increasing body of conflicting cases addressing whether Section 253(a) of the Communications Act expresses a clear intention by Congress to preempt state laws that regulate or prohibit a state's political subdivisions from providing telecommunications services. Petitioner seeks review of the decision of the Nebraska Supreme Court holding that Section 253(a) preempts state authority. *In re Lincoln Electric System,* 655 N.W.2d 363 (Neb. 2003). This decision carries legal and economic consequences that will have repercussions regarding state sovereignty and that will directly impact the daily business and investment decisions of states, political subdivisions, private telecommunications companies and consumers. It is necessary for this Court to provide the clear guidance urgently needed by the divided lower courts and the affected states, the political subdivisions of the states and private telecommunications companies.

ARGUMENT

I. THE DECISION BELOW REFLECTS THE GROWING CONFLICT AMONG STATE AND FEDERAL COURTS REGARDING THE SCOPE OF FEDERAL PREEMPTION OVER STATE AUTHORITY IN SECTION 253(a) OF THE COMMUNICATIONS ACT.

Conflicting interpretations of Section 253(a) of the Communications Act of 1934 ("Act"), 47 U.S.C. § 253(a), by two U.S. appellate courts as well as by the highest courts of two states within the Eighth Circuit, are creating enormous uncertainty in the telecommunications industry, affecting the ability of the Federal Communications Commission ("FCC"), the states, the political subdivisions of the states and private telecommunications companies to make decisions regarding the provision of telecommunications services to the public.

As amended by the Telecommunications Act of 1996, ("1996 Act") Pub. L. No. 104-104, 110 Stat. 56, Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). If the FCC finds that "a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a)..., the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." 47 U.S.C. § 253(d). The question as to whether the statutory language deprives the states of the ability to control their political subdivisions' provision of telecommunications service has resulted in inconsistent decisions from the U.S. Court of Appeals for the Eighth Circuit and the U.S. Court of

Appeals for the District of Columbia Circuit, as well as between the Nebraska Supreme Court and the Iowa Supreme Court. The appropriate interpretation of the statutory language presents an important Federal question requiring resolution by this Court so that the telecommunications services industry may develop with certainty as to the scope of Section 253(a) relative to a state's authority to limit or prohibit its political subdivisions' ability to provide telecommunications services.

In the case below, *In re Lincoln Electric System,* 655 N.W.2d 363 (Neb. 2003), the Lincoln Electric System ("LES"), a political subdivision of the State of Nebraska, filed an application with the Nebraska Public Service Commission ("PSC") to provide contract telecommunications services in and around Lincoln, Nebraska. The PSC denied its application and the LES appealed to the Nebraska Court of Appeals. The Nebraska Supreme Court removed the case to its docket. While the appeal was pending, the Nebraska legislature passed a law prohibiting a political subdivision from holding a permit as a contract carrier of intrastate telecommunications service. Neb. Rev. Stat. §§ 86-128(1)(b) and 86-575(2) (Cum. Supp. 2002).

In its decision, the Nebraska Supreme Court recognized the significant split of authority regarding the scope of federal preemption under Section 253(a). *Lincoln,* 655 N.W.2d at 369-371. The Nebraska court observed that in *City of Abilene v. FCC,* 164 F.3d 49 (D.C. Cir. 1999), the D.C. Circuit upheld an FCC order refusing to preempt Texas law prohibiting municipalities or municipally-owned electric utilities from offering for sale certain telecommunications services.[2] The D.C. Circuit decision, relying on this Court's

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[2] *In re Public Utility Commission,* 13 FCC Rcd 3460, 3545-3546 (1997). In that proceeding, the FCC was unable to find that the use of the term "any entity" in Section 253(a) constituted a sufficiently clear statement

(Footnote continued on next page)

opinion in *Gregory,* held that the language of Section 253(a) was not sufficiently clear to find that Congress intended to include municipalities in the category of "any entity." *Id.* at 54. The Nebraska court also acknowledged that the Iowa Supreme Court had determined that Section 253(a) did not prevent the state from regulating the provision of telecommunications services by state political subdivisions. *Iowa Tel. Ass'n. v. City of Hawarden,* 589 N.W. 2d 245 (Iowa 1999).

The Nebraska court, however, diverged from the holdings of the D.C. Circuit and the Iowa Supreme Court, and instead followed the decision of the Eighth Circuit in *Missouri Municipal League v. FCC,* 299 F.3d 949 (8th Cir. 2002).[3] The Eighth Circuit found that "municipality" was clearly within the definition of "any entity" as used in Section 253(a) and preempted Missouri laws prohibiting political subdivisions from providing telecommunications services.[4] The Nebraska court thus held that Congress' use of the term "any entity" in Section 253(a) indicated an expansive

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(Footnote continued from previous page)
that Congress intended to preempt state authority, citing this Court's decision in *Gregory v. Ashcroft,* 501 US 452 (1991) (fundamental state decisions remain within the state's authority absent a clear indication of Congressional intent).

[3] The Eighth Circuit decision is pending before this Court. *See Federal Communications Commission v. Missouri Municipal League, et. al,* 299 F.3d 949 (8th Cir. 2002), *petition for cert. filed* (U.S. Mar. 20, 2003) (Case No. 02-1386). Given the similarity of the issues, *amici* support the request of petitioners that if the Court grants review of the Eighth Circuit decision, this Petition for Writ of Certiorari be granted and this case be consolidated with the Eighth Circuit case for briefing and oral argument.

[4] *Accord City of Bristol, VA v. Earley,* 145 F. Supp.2d 741 (W.D. Va. 2001) (state statute which prohibited local governmental entities from offering telecommunications services was preempted by Section 253(a)) *dismissed on appeal as moot, City of Bristol, VA v. Virginia Telecomm.* No. 01-1741 (4th Cir. May 1, 2002).

statutory scope that would include a political subdivision otherwise subject to the sovereign authority of its controlling state. Further, the Nebraska court found that the Nebraska laws prohibiting political subdivisions from the provision of telecommunications services are preempted by federal law and are unconstitutional. *Lincoln,* 655 N.W.2d at 371-372.

The conflict that exists among the federal circuits and the state courts presents a significant issue regarding state sovereign rights to define the boundaries of authority granted to the state's political subdivisions. Review of the Nebraska decision is necessary to resolve its apparent interference with state sovereign rights. Generally, courts will not interpret a federal statute in such a way as to intrude upon an area traditionally regulated by the states absent a clear expression of congressional intent to do so. *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991). In fact, this Court has made clear that a federal statute does not preempt the authority of a state unless such is the clear and manifest purpose of Congress. *Wisconsin Public Intervenor v. Ralph Mortier,* 501 U.S. 597, 611-612 (1991) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act did not "provide any clear and manifest indication that Congress sought to supplant local authority over pesticide regulation impliedly."). Section 253 does not provide a clear indication of Congress' intention to usurp state authority over the provision of telecommunications services by its political subdivisions.

While some courts have interpreted Section 253(a) to prohibit state control over the entry of political subdivisions into the telecommunications services market, the structure of the section itself is inconsistent with those interpretations. Rather, *amici* submit that Sections 253(b) and (c) inform the meaning of the language of subsection (a), and this Court should consider that Section 253, taken as a whole, was never intended by Congress, either implicitly or explicitly, to

alter the relationship between a state and its political subdivisions.[5] Section 253(b) states that nothing in the section shall affect state authority to impose "requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers," thereby preserving the states' role in regulating intrastate communications. 47 U.S.C. § 253(b). In fact, subsection (b) contemplates that states may restrict entry to prevent erosion of universal service and service quality in rural, high cost and insular areas as required in Section 254. 47 U.S.C. § 254. Similarly, Section 253(c) states "nothing in the section shall affect the ability of state and local governments to manage public rights of way." 47 U.S.C. § 253(c).

As this Court has consistently found, a statute must be read as a whole, since the meaning of statutory language depends upon context. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Thus, this Court should consider that not only does Section 253(a) lack the clear expression of congressional intent to preempt a state's authority over its political subdivisions, but any arguable ambiguity evaporates when the term is understood in context of the reservation of state authority contained in subsections (b) and (c).

Given the conflicting judicial interpretations, it is important that this Court determine the scope and meaning of section 253 by reading subsection (a) within the context of the whole section as well as by discerning congressional intent as to the meaning of "any entity."

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[5] *See BellSouth Telecommunications v. Town of Palm Beach*, 252 F.3d 1169, 1188-1191 (11th Cir. 2001) (finding that Section 253 should not be interpreted as Congressional intent to take away a state's basic responsibility to protect the public safety and welfare and to provide and promote universal service).

II. RESOLUTION OF THE CONFLICT REGARDING STATE AUTHORITY OVER THE PROVISION OF TELECOMMUNICATIONS SERVICES BY POLITICAL SUBDIVISIONS OF A STATE IS NECESSARY TO PROVIDE CERTAINTY TO THE TELECOMMUNICATIONS INDUSTRY.

The conflict between the Federal and state courts regarding the reach of Section 253(a) poses a significant concern for all providers of telecommunications services that currently operate or seek to operate within a state. In order to make appropriate investment and business decisions, all providers, both private and public, require certainty as to whether political subdivisions of a state will be permitted to provide telecommunications services in that state. As Justice Scalia observed in *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), the telecommunications industry is capital intensive, and private companies must raise capital in order to invest the significant monies required to build and maintain the telecommunications infrastructure necessary to serve the public.

The investment decisions that private companies must make are acutely affected by whether a political subdivision of the state is providing telecommunications services in the marketplace. Political subdivisions benefit from a variety of tax and regulatory advantages not available to the private sector.[6] They generally are able to issue tax-free debt; they have access to public rights of way on terms not available to private companies; they can avoid franchise fees and other taxes private firms must pay; they are not subject to Generally Accepted Accounting Principles applied to private companies and they often can receive interest-free loans or

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[6] *See* JEFFREY A. EISENACH, DOES GOVERNMENT BELONG IN THE TELECOM BUSINESS? at 15 (The Progress and Freedom Foundation, Progress on Point, Release 8.1, January 2001).

access to capital only available to government entities.[7] They may be able to take advantage of inside information regarding local and state contracts and have preferential access to bidding processes for government projects. More importantly, the political subdivision may hold dual roles as both regulator and competitor. These advantages pose important marketplace considerations for private companies that are likely to govern whether private companies will continue to invest in a telecommunications services market served by a political subdivision of a state and could very well inhibit private sector investment. The advantages that exist for a political subdivision that provides telecommunications services will affect whether private providers will be able to compete effectively and will be able to maintain universal service. Whether or not a political subdivision will have a significant presence in the telecommunications services market could materially affect obligations to provide universal service.[8]

A state has a legitimate interest in assessing the impact of the provision of telecommunications services by a political subdivision as it implicates unique issues regarding the potential impact on the state's economy, revenues, taxes and public and private investment within the state. For example,

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[7] *Id.*

[8] There are a number of significant and complex regulatory issues that are before the FCC addressing the universal service obligations of all providers of telecommunications services. *See, e.g., Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support and the ETC Designation Process,* Public Notice, CC Docket No. 96-45, 18 FCC Rcd. 1941 (2003); *Federal-State Joint Board on Universal Service; Review of the Definition of Universal Service,* Notice of Proposed Rulemaking, CC Docket No. 96-45, 18 FCC Rcd. 2932 (2003); *Federal-State Joint Board on Universal Service,* Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 17 FCC Rcd 24952 (2002).

in 1997, the Tacoma Public Utilities, located in Tacoma, Washington, built a publicly-funded telecommunications system.[9] By the Fall of 2000, the original capital budget had grown from $40 million to $86.5 million, the network had not reached a break-even point and plans to extend the system were postponed indefinitely.[10] "Because it is a public utility, the Click! Network is forcing the citizens of Tacoma to take risks that normally would be borne by private stockholders. The result is that the Click! Network is adding unnecessary costs to the already-rising trend of Tacoma's energy prices."[11] The issues and impact of the provision of telecommunications services by a political subdivision, such as those facing the residents of Tacoma, are appropriate for states to consider when determining whether a political subdivision should provide telecommunications services. The political subdivisions of a state should not be free to disregard the assessment of the state legislature as to whether their provision of telecommunications services will be beneficial to the state and to its citizens.

It is very likely that additional controversies regarding the scope of Section 253(a) will arise, as more political subdivisions attempt to provide telecommunications services and more states address whether that is, in fact, desirable. In addition to Nebraska, the states of Arkansas, Florida, Missouri, Minnesota, Nevada, South Carolina, Tennessee, Texas, Utah, Virginia and Washington, have enacted legislation to limit or prohibit the provision of

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[9] PAUL GUPPY, WHEN GOVERNMENT ENTERS THE TELECOM MARKET: AN ASSESSMENT OF TACOMA'S CLICK! NETWORK (The Progress and Freedom Foundation, Progress on Point, Release 9.7, February 2002).

[10] *Id.* at 6.

[11] *Id.* at 9. Similarly, in Iowa, the publicly owned Iowa Communications Network regularly receives major infusions of state funds in order to continue operating. *Id. See* also Iowa Code §§ 8D.11 and 8D.14 (2003).

telecommunications services by the political subdivisions of these states.[12] The decisions of the elected representatives of the states to determine the authority of local political subdivisions are an essential exercise of state sovereignty. The Court should resolve the conflicting interpretations of Section 253(a) and provide much-needed certainty regarding the authority of a state to control or prevent the provision of telecommunications services by the political subdivisions within a state.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Donna N. Lampert
Counsel of Record

Mark J. O'Connor
Linda L. Kent
Lampert & O'Connor
1750 K Street, NW
Suite 600
Washington,D.C.20006
(202) 887-6230

---

[12] *See* Ark. Code Ann. § 23-17-490 (Michie Supp. 2001), Fla. Stat. Ann. § 166.047 (West 2000), Minn. Stat. Ann. § 237.19, (West 1992), Mo. Ann. Stat. § 392.410(7) (West Supp. 2003), Nev. Rev. Stat. Ann. § 268.086 (Michie Supp. 2001), S.C. Code Ann. § 58-9-2600 (Law Co-op 2002), Tenn. Code Ann. §§ 7.52-601 *et. seq.* (Supp. 2001), Tex. Util. Code § 54.201, *et. seq* (2002), Utah Code Ann. § 10-18-101 *et. seq.* (2001), Va. Code Ann. § 15.2-1500(B) (Michie Supp. 2001), Wash. Rev. Code § 54.16.330 (2003). See *also Public Power: Powering the 21st Century with Community Broadband Services* (APPA Fact Sheet, Community Broadband Fact Sheet, May 2003) at 4.

David Zesiger
Independent Telephone
and Telecommunications
Alliance
1300 Connecticut Ave., NW
Suite 600
Washington, D.C. 20036
(202) 775-8116
Counsel for the
Independent Telephone and
Telecommunications
Alliance

L. Marie Guillory
Alexia D. Bowie Ransom
National Telecommunications
Cooperative Association
4121 Wilson Blvd, 10th Floor
Arlington, VA 22203
(703) 351- 2000
Counsel for the National
Telecommunications Cooperative
Association

Organization for the
Promotion and
Advancement of Small
Telecommunications
Companies
21 Dupont Circle, NW
Washington,D.C.20036
(202) 659-5990

Lawrence E. Sarjeant
Indra Sehdev Chalk
Michael T. McMenamin
Robin Tuttle
United States Telecom Association
1401 H Street, NW, Suite 600
Washington, D.C. 20005
(202) 326-7300
Counsel for the United States Telecom Association

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No. 02-1591

In The
Supreme Court of the United States

NEBRASKA TELECOMMUNICATIONS ASSOCIATION AND NEBRASKA CABLE COMMUNICATIONS ASSOCIATION,

Petitioners,

vs.

CITY OF LINCOLN, NEBRASKA, d/b/a LINCOLN ELECTRIC SYSTEM,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

HARDING, SHULTZ & DOWNS and
JACK L. SHULTZ
Counsel of Record
GREGORY D. BARTON
800 Lincoln Square
121 S. 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 434-3000
Attorneys for Petitioners Nebraska Telecommunications Association and Nebraska Cable Communications Association

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

On April 30, 2003, Petitioners the Nebraska Telecommunications Association (the "NTA") and the Nebraska Cable Communications Association ("NCCA") filed their Petition for Writ of Certiorari with this Court. Petitioners are asking the Court to resolve the question of whether Congress intended to preempt the historic powers of the States to regulate their own political subdivisions, in enacting 47 U.S.C. § 253(a), which precludes state or local laws that prohibit or have the effect of prohibiting the ability of "any entity" to provide interstate or intrastate telecommunications service.

On May 23, 2003, Respondent the City of Lincoln, Nebraska, d/b/a Lincoln Electric System ("LES") filed its Brief in Opposition to the Petition for Writ of Certiorari of the NTA and the NCCA.[1] LES has raised two primary contentions: (1) the Nebraska Supreme Court's decision purportedly rests on an independent and adequate state law ground; and (2) the conflict between the lower federal and state courts regarding the scope of federal preemption under 47 U.S.C. § 253(a) is purportedly "less than it appears." (LES's Brief, at p. 20.)

This Reply Brief is respectfully submitted on behalf of Petitioners the NTA and the NCCA. For the reasons discussed in detail below, LES's arguments are without

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[1] LES filed a combined Brief in opposition to the Petition for Writ of Certiorari filed by the NTA and the NCCA, and the separate Petition for Writ of Certiorari filed by the Nebraska Public Service Commission, which is docketed at Case No. 02-1599.

merit and should be rejected, and the Petition for Writ of Certiorari should be granted.

ARGUMENT

1. THE NEBRASKA SUPREME COURT'S FEDERAL PREEMPTION HOLDING WAS INTEGRAL TO THAT COURT'S DISPOSITION OF THE MATTER.

LES admits that the Nebraska Supreme Court had to resolve the issue of federal preemption under 47 U.S.C. § 253(a) ("[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service"). (LES's Brief, at pp. 7-8 and 10-12.) Nevertheless, LES asserts that the decision below rested upon an adequate and independent state law ground since, after resolving the federal preemption issue, the Nebraska Supreme Court also held that, "because LES has not been authorized by ordinance to seek regulatory authority to provide such services, the Commission properly denied its application." (App. 24; *In re Application of Lincoln Electric System*, 265 Neb. 70, 82, 655 N.W.2d 363, 373.) LES's "adequate and independent state law ground" contentions are contrary to the Nebraska Supreme Court's treatment of the issues below and to this Court's precedent.

The dependence of the state law ground upon which the Nebraska Supreme Court ultimately disposed of the appeal is clearly shown by the decision below. The Nebraska Supreme Court believed that the federal preemption issue was the key threshold issue on appeal, stating that "[u]nless LES is correct in its assertion that these

[state] statutory provisions are preempted by federal law, *the single issue presented in this appeal" of whether LES lacked the legal authority under state common law to operate as a for-hire telecommunications carrier "would be moot.*" (App. 6; 265 Neb. at 75, 655 N.W.2d at 368-369) (emphasis added). Thus, the Nebraska Supreme Court recognized that its ability to even reach the state common law issue on appeal was wholly dependent on how the court resolved the federal preemption issue.[2]

In similar circumstances, this Court has held that a state court's federal-law holding was integral to the disposition of the matter, such that the Court had jurisdiction to review the federal question. In *Intern. Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380 (1986), a discharged ship superintendent sued his union for fraud and misrepresentation. Following a jury trial, a verdict was entered in the superintendent's favor. The union then moved for a judgment notwithstanding the verdict on the ground that the superintendent's lawsuit was preempted by the National Labor Relations Act. The trial court ruled that the union had waived its preemption claim by failing

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[2] LES, itself, has acknowledged the interdependence between the federal and state law issues resolved below. In its Brief, LES concedes that, in order for the Nebraska court to reach the "state municipal law" question, "*the court first had to address LES' preemption challenge* to the recently enacted statutory prohibition against municipal telecommunications services found in L.B. 827," and the "Nebraska Supreme Court was *forced to address the preemption question* because the legislature enacted L.B. 827 while LES' appeal was pending." (LES's Brief, at pp. 7 and 11) (emphasis added).

to assert preemption as an affirmative defense, and the Alabama Supreme Court affirmed.

After the union appealed to this Court, the superintendent moved to dismiss the appeal on the ground that the decision below rested upon an adequate and independent state ground "because the Alabama Supreme Court's decision was based on an application of a state procedural rule." *Davis*, 476 U.S. at 386. The *Davis* Court held that it had jurisdiction to review the Alabama court's federal preemption holding for reasons which are instructive in this case:

> . . . [A] determination of congressional intent and of the boundaries and character of a pre-empting congressional enactment is one of federal law. *Pre-emption, the practical manifestation of the Supremacy Clause, is always a federal question.*
>
> If the Alabama procedural ruling under state law implicates an underlying question of federal law, however, the state law is not an independent and adequate state ground supporting the judgment:
>
> "[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded. . . . In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory." *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S. Ct. 1087, 1092, 84 L.Ed.2d 53 (1985) (citing *Herb v. Pitcairn, supra*, 324 U.S., at 126, 65 S. Ct.,

> at 463; *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164, 37 S.Ct. 318, 320, 61 L.Ed. 644 (1917)).
>
> To determine the sufficiency of the state procedural ground relied upon by the Alabama Supreme Court *we must ascertain whether that court correctly resolved the antecedent federal question* regarding the nature of *Garmon* preemption under the NLRA.

Davis, 476 U.S. at 388 (emphasis added). *See also Ohio v. Reiner*, 532 U.S. 17 (2001) (the Court has "jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law").

In *Davis*, the Alabama Supreme Court had to first resolve the federal issue of whether *Garmon* preemption was a waivable affirmative defense, before the Alabama court could reach the issue of whether such a waiver had occurred under state procedural law. Similarly, in this case, the Nebraska Supreme Court had to first resolve the federal issue of whether § 253(a) preempted state statutes which preclude a political subdivision from receiving a permit as a telecommunications contract carrier, before the Nebraska court could reach the issue of whether LES had the legal authority to operate as a for-hire telecommunications carrier under state common law.

The NTA and the NCCA have properly sought to invoke this Court's jurisdiction to review the Nebraska Supreme Court's holding that § 253(a) preempts state laws which preclude political subdivisions from receiving a permit as a telecommunications contract carrier because "[p]re-emption, the practical manifestation of the Supremacy Clause, is always a federal question." *See Davis*, 476

U.S. at 388 (emphasis added). Where, as here, a state court's ability to even reach a state law question "depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law," and this Court's "jurisdiction is not precluded." *See Id.*

Clearly, the Nebraska court's "federal-law holding is integral to the state court's disposition of the matter," and a ruling by this Court on the § 253(a) preemption issue would be "in no respect advisory." *See Id.* Accordingly, this Court has jurisdiction to review the decision below because this federal preemption issue was the threshold issue in the Nebraska court (App. 6; 265 Neb. at 75, 655 N.W.2d at 368-369), and this Court has "jurisdiction over a state-court judgment that rests, as a threshold matter, on a determination of federal law." *See Reiner*, 532 U.S. at 20.

2. THE CONFLICTS BETWEEN THE NEBRASKA AND IOWA SUPREME COURTS, AND THE DISTRICT OF COLUMBIA AND EIGHTH CIRCUITS, CONCERNING THE SCOPE OF FEDERAL PREEMPTION UNDER 47 U.S.C. § 253(a), MERIT THIS COURT'S ATTENTION.

In its Brief, LES has suggested that allowing the lower courts to muddle through preemption issues arising under 47 U.S.C. § 253(a), with no guidance from this Court, may eventually limit the significance of the split of legal authority on the issue of the scope of preemption

under § 253(a). (LES's Brief, at pp. 20-22.)[3] The short answer to this contention is that this Court appears to think that a conflict among the federal circuit courts or among state courts of last resort on the same important federal question is a "compelling reason" to grant a petition for writ of certiorari. *See*, SUP. CT. R. 10 (the character of reasons the Court considers "compelling," in deciding whether to grant certiorari include that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" and that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals").

As discussed in detail in the Petition for Writ of Certiorari of the NTA and the NCCA, there is a significant conflict between the lower courts on the issue of whether § 253(a) preempts state laws which prohibit political subdivisions from providing telecommunications services. *Compare*, (App. 8-12; 265 Neb. at 76-80, 655 N.W.2d at 368-370) (Nebraska statutes which prohibit political subdivisions from providing for-hire telecommunications services are preempted by § 253(a)); and *Missouri Municipal League v. FCC*, 299 F.3d 949 (8th Cir. 2002) (Missouri statute which prevented municipalities and municipally-owned utilities from providing telecommunications services

[3] According to LES, any court which followed the D.C. Circuit's holding in *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) (§ 253(a) does not preempt state statutes which regulate or prohibit a state political subdivision's entry into the telecommunications field) "merely parroted that decision" and did not "undertake any meaningful analysis of the preemption question." (LES's Brief, at pp. 20-21.)

are preempted by § 253(a)), *with, City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) (§ 253(a) does not preempt Texas statutes which bar a political subdivision's entry into the telecommunications field); and *Iowa Tel. Ass'n v. City of Hawarden*, 589 N.W.2d 245 (Iowa S. Ct. 1999) (§ 253(a) "does not prevent the State of Iowa from prohibiting the offering of local telephone service by its political subdivisions"). The conflict among the lower courts on this issue of national importance is real, and no amount of obfuscation by LES can make that conflict disappear.

In a further attempt to blunt the sharpness of the conflict among the lower courts, LES suggests that "any administrative issues the FCC may encounter while the" conflict among the lower courts on the scope of § 253(a) preemption somehow, inexplicably, works itself out "can be resolved by the FCC rejecting the *City of Abilene* decision." (LES's Brief, at p. 21.)[4] This suggestion borders on the ridiculous. Under LES's logic, "any administrative issues the FCC may encounter" could also be resolved by the FCC deciding to follow the *City of Abilene* decision, and rejecting the *Missouri Municipal League* decision.

While federal courts of appeals are free to disagree with each other, federal administrative agencies are not free to disregard valid judgments by the federal courts of appeals. It is established federal law that no administrative agency, including the FCC, can simply ignore a federal court judgment. *See Town of Deerfield, N.Y. v. F.C.C.*, 992

[4] The Federal Communications Commission filed a Petition for Writ of Certiorari seeking review of the decision in *Missouri Municipal League*, which is pending in this Court at Case No. 02-1386.

F.2d 420, 428 (2nd Cir. 1993) ("[n]or may an administrative agency choose simply to ignore a federal-court judgment" as judgments "'within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned *or refused full faith and credit* by another Department of Government,'" and judgments by Article III courts are not "'subject to later review or alteration by administrative action'") (emphasis added) quoting *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 113-114 (1948). The FCC has petitioned this Court for a writ of certiorari to review the Eighth Circuit's decision in *Missouri Municipal League* (Case No. 02-1386) precisely because the FCC cannot choose to simply ignore the conflicting federal court judgments of the Eighth Circuit in *Missouri Municipal League* and of the D.C. Circuit in *City of Abilene*.

This case raises the same important question about the scope of federal preemption under § 253(a) of the Telecommunications Act, which the FCC has raised in Case No. 02-1386. Thus, if this Court grants review in *Nixon v. Missouri Municipal League*, Case No. 02-1238 (filed February 18, 2003), then this Petition should also be granted and this case consolidated with the *Nixon* case for briefing and oral argument on the merits.

CONCLUSION

For the foregoing reasons, and for those set forth in the Petition for Writ of Certiorari of Petitioners the Nebraska Telecommunications Association and the Nebraska Cable Communications Association, this Court should reject LES's arguments and issue a Writ of Certiorari from

this Honorable Court to review the judgment of the Nebraska Supreme Court in *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003), to resolve the conflicts between the Nebraska and Iowa Supreme Courts, and between the District of Columbia and Eighth Circuits, concerning the important federal question of whether 47 U.S.C. § 253(a) was intended by Congress to infringe upon the States' historic absolute discretion to control their political subdivisions.

Respectfully submitted,

Nebraska Telecommunications Association and Nebraska Cable Communications Association, Petitioners

JACK L. SHULTZ
GREGORY D. BARTON
HARDING, SHULTZ & DOWNS
800 Lincoln Square
121 S. 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028
(402) 434-3000

Counsel of Record for Petitioners Nebraska Telecommunications Association and Nebraska Cable Communications Association